TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, [redacted] 1912.

No. 85.

SAMUEL M. PLUMLEY, APPELLANT,

vs.

THE UNITED STATES.

No. 86.

THE UNITED STATES, APPELLANT,

vs.

SAMUEL M. PLUMLEY.

APPEALS FROM THE COURT OF CLAIMS.

FILED APRIL 16, 1910.

(22107 and 22108)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 255.

SAMUEL M. PLUMLEY, APPELLANT,

vs.

THE UNITED STATES.

No. 256.

THE UNITED STATES, APPELLANT,

vs.

SAMUEL M. PLUMLEY.

APPEALS FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

Term 1896–97.

SAMUEL M. PLUMLEY
v.
THE UNITED STATES OF AMERICA. } No. 20781.

I. Petition.

(Filed May 10, 1897.)

To the honorable judges of the Court of Claims:

Your petitioner, Samuel M. Plumley, of the city of Washington, in the District of Columbia, respectfully shows to the court:

First. That he is a citizen of the United States and a resident of the city of Washington, in the District of Columbia; that he is now and has been for many years engaged as a contractor and builder in the said District; that he has always yielded true allegiance to the United States and that he is the sole owner of the claim hereinafter sued on, never having sold or assigned the same or any part thereof to any person or persons.

Second. That heretofore, to wit, on or about October 2, 1888, a certain Patrick H. McLaughlin and others, trading under the firm of P. H. McLaughlin & Company, entered into a contract with the United States represented by the Secretary of the Navy for the construction, erection, and finishing of several buildings and other work for a naval observatory within the new Naval Observatory grounds on Georgetown Heights near Washington, in the District of
2 Columbia, which said contract was on the 8th day of September, 1891, declared by the Secretary of the Navy to be forfeited on part of the said P. H. McLaughlin & Co. on account of their failure to make satisfactory progress towards the completion of the work.

Third. After the forfeiture of the said contract mentioned in the second paragraph of this petition and due advertisement your petitioner made a proposal for the completion of the said work mentioned in said paragraph, which was duly accepted by the Secretary of the Navy. Thereupon and after the acceptance of said proposal a contract was entered into between your petitioner and the said United States represented by the Secretary of the Navy and dated the 16th day of February, 1892, whereby your petitioner agreed to furnish all necessary material and labor and complete the construction, erection, and finishing of the buildings, coal vault, conduit or tunnel, and all other work required under the aforementioned contract with P. H. McLaughlin & Co., in conformity with, and subject to the conditions stated in said contract and the drawings, plans, specification (and duly authorized changes therein), proposal of the

said P. H. McLaughlin & Co., dated June 12, 1888, and letter of the Secretary of the Navy, dated June 29, 1888, accepting said proposal. And the said United States for and in consideration of the completion by your petitioner of the said contract of the said P. H. McLaughlin & Co. and duly authorized changes therein, agreed to pay your petitioner the sum of twenty-five thousand nine hundred and forty dollars (25,940) in four installments, with a reservation of ten (10) per cent for each installment until the completion and acceptance of the work. All of which will more fully and at large appear by reference to the said contract with your petitioner, a copy of which is herewith filed marked "Exhibit A" and made a part hereof.

3 The letter of the Secretary of the Navy accepting the proposal of your petitioner dated the 4th day of February, 1892, is also filed herewith and made a part hereof and is marked "Exhibit B."

Fourth. Immediately upon entering into said contract your petitioner set about arranging and did arrange for the expeditious prosecution of said work, procured and arranged the necessary material and labor in anticipation of completing said building by June 1, 1892. But by delays on the part of the Government your petitioner was not allowed to complete the said contract until the month of February, 1893, and was thereby prevented from engaging in other work and rendered unable to do other work and was occasioned great loss thereby in time and money to the extent of the sum of eighteen hundred dollars ($1,800).

Fifth. That in and about the same work and outside of the said contract the United States required the claimant to do and under said requirement he did a large amount of work not contemplated by or included in said contract and for which the claimant has not been paid. The United States required the claimant to furnish, and under said requirement he did furnish, a large amount of material not contemplated by or included in his said proposal and contract for which no compensation, consideration, or payment has ever been made by the United States to this claimant. The said material and work is embraced in the following not included in the said contract nor in the duly authorized changes therein, to wit:

Ventilation to three transit circle rooms and prime vertical building of the value	$7,000
Plastering in cellar rooms on the ceilings in the main building, great equatorial and clock rooms of the value of	900
Concrete work in the cellars of the main building, great equatorial and clock room of the value of	1,680
4 Laying 100 feet of 6-inch water main from the boiler house to a point 100 feet south of the boiler house of the value of	150
Laying 4-inch drain pipe around great equatorial building of the value of	306
Extra work in lobby between main building and small equatorial—mill work; carpenter's work, plastering, and hardware of the value of	250
Extra work in corridor between small equatorial and main transit of the value of	50
Additional work on wooden steps to two observers' rooms, two transit rooms, and prime vertical building of the value of	150

Taking up wooden floor, concreting and laying tile floor in librarian's room of the value of	$92
Laying concrete floors in two observers' rooms of the value of	180
Sand packing around instrument piers in three transit rooms and prime vertical buildings of the value of	100
Furnishing slate saddles to doors in the main building of the value of	155

Sixth. And your petitioner says that he is justly entitled to have and receive of the defendant, and that there is justly due and owing from the United States to him on account as aforesaid, the sum of $12,813, which remains wholly unpaid.

Wherefore the claimant demands judgment against the United States in the sum of $12,813 (twelve thousand eight hundred and thirteen dollars) and proper relief in the premises.

SAMUEL M. PLUMLEY.

E. H. THOMAS,
Attorney of Record.

5 DISTRICT OF COLUMBIA, *ss:*

Samuel M. Plumley, of lawful age, being duly sworn, upon his oath says that he is the petitioner named in the foregoing petition; that he has read over and understands the same; that the material allegations set forth therein are true in substance and in fact.

SAMUEL M. PLUMLEY.

Subscribed and sworn to before me this 3d day of May, 1897.

JAMES B. GREEN, *Notary Public.*

EXHIBIT A.

CONTRACT FOR THE COMPLETION OF THE NEW NAVAL OBSERVATORY ON GEORGETOWN HEIGHTS, WASHINGTON, D. C.

Contract, of two parts, made and concluded this sixteenth day of February, A. D. 1892, by and between Samuel M. Plumley, of the city of Washington, District of Columbia, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part.

Whereas the contract entered into, under date of October 2, 1888, by and between Patrick H. McLaughlin, Augustus Davis, jr., and John G. Craig, all of the city of Washington, in the District of Columbia, as copartners, doing business in the said city of Washington under the firm name of P. H. McLaughlin and Company, parties of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction, erection, and finishing of several buildings, a coal vault, a conduit or tunnel, and other work for a naval observatory, within the new Naval Observatory grounds, on Georgetown Heights, near Washington,
6 in the District of Columbia, was, on the 8th of September, 1891, declared by the Secretary of the Navy to be forfeited

on the part of the parties of the first part on account of their failure to make satisfactory progress towards the completion of the work;

And whereas, after due advertisement, the proposal of the said party of the first part hereto for the completion of the construction, erection, and finishing of the buildings, coal vault, conduit or tunnel, and other work aforesaid has been duly accepted by the Secretary of the Navy:

Now, therefore, this contract witnesseth that, for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for himself and his heirs and assigns and his personal and legal representatives, does hereby covenant and agree to and with the United States as follows, that is to say:

First. The party of the first part will, at his own risk and expense, furnish all necessary material and labor and complete the construction, erection, and finishing of said buildings, coal vault, conduit or tunnel, and all other work required under the aforementioned contract with P. H. McLaughlin and Company in conformity with and subject to the conditions stated in said contract and the drawings, plans, specifications (and duly authorized changes therein), proposal of the said P. H. McLaughlin and Company, dated June 12, 1888, and letter of the Secretary of the Navy, dated June 29, 1888, accepting said proposal, annexed to said contract, and will deliver said buildings, coal vault, conduit or tunnel, and all other work, complete in all respects as required by said contract, drawings, plans, specifications (and duly authorized changes therein), proposal, and letter, to such person as the Secretary of the Navy may direct to receive
7 the same, it being expressly understood, covenanted, and agreed that all suitable materials on hand for completing said buildings and their appurtenances and all other work required hereunder will be used for that purpose, and that all materials to be furnished by the party of the first part shall conform to samples or information furnished by the architect.

Second. The completion of the construction, erection, and finishing of said buildings, and all other work herein contracted for, shall conform in all respects to and with the drawings, plans, specifications (and duly authorized changes therein), proposal, and letter aforesaid, and the stipulations, conditions, covenants, and provisions of the aforesaid contract with P. H. McLaughlin and Company, dated October 2, 1888, and the proposal of the party of the first part hereto, dated January 23, 1892, which drawings, plans, specifications (with the duly authorized changes therein), proposals, letter, and contract are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein.

Third. The party of the first part will commence the work herein contracted for within ten days from the date hereof and will complete the construction, erection, and finishing of said buildings and appurtenances, and all other work required under this contract, ready for delivery to the United States on or before the first day of

June, 1892. In case the completion of the work required under this contract shall be delayed beyond the said date (June 1, 1892), deductions shall be made from the contract price of the work for each and every day (except Sundays) during the continuance of such delay and until the work shall be completed and ready for delivery to the United States at the rate of twenty-five dollars per day, all such deductions from the contract price of the work to be made from
8 time to time from any payment or payments falling due under this contract; provided, however, that such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand-out of workmen employed in or upon the work, or by other circumstances beyond the control of the party of the first part, but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified; provided further, that in case of such alleged delay the party of the first part shall give immediate notice thereof, in writing, to the Secretary of the Navy.

Fourth. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance adopted or used in or about the completion of the construction, erection, and finishing of said building and appurtenances, or any part thereof, under this contract, and to protect and discharge the Government from all liability on account thereof or on account of the use thereof by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Fifth. The buildings and appurtenances embraced by this contract, and all materials and appliances provided for and used in the completion thereof, shall be kept duly insured, which insurance shall be renewed and increased from time to time, by and at the expense of the party of the first part, the loss, if any, to be stated in the policies as payable to the United States, the insurance to be effected in such manner and in such companies as shall be approved by the
9 Secretary of the Navy, and in an amount, which shall be not less than the sum of two hundred thousand dollars ($200,000), to be fixed from time to time by him.

Sixth. It is mutually understood, covenanted, and agreed by and between the respective parties hereto, that this contract shall not, nor shall any interest herein be transferred by the party of the first part to any other person or persons, and that any such transfer shall cause the annulment of this contract so far as the United States are concerned; and that all rights of action to recover for any breach of this contract by the party of the first part are reserved to the United States.

Seventh. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Mem-

ber of or Delegate to Congress, officer of the Navy or Marine Corps, nor any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

Eighth. The United States, in consideration of the premises, do hereby contract, promise, and engage to and with the party of the first part, as follows:

1. The contract price to be paid for the completion of the construction, erection, and finishing of the buildings, the coal vault, the conduit or tunnel aforesaid, and all other work required under this contract, shall be twenty-five thousand nine hundred and forty dollars ($25,940).

2. Payments shall be made by the United States in four installments, as the work progresses, with a reservation of 10 per cent from each installment to be held until the final completion and acceptance of the entire work.

3. No payment shall be made except upon bills, in triplicate, certified by the architect, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or his order.

5. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part he shall be entitled, within ten days after the filing and acceptance of his claim, to receive the last payment and all reservations, or so much thereof as he may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

Ninth. If any discrepancy appear between the drawings, plans, specifications, proposals, letter, or contract of October 2, 1888, aforesaid, and this contract the matter shall be at once referred to the Secretary of the Navy for determination and the party of the first part hereby binds himself, his heirs, and assigns, and his personal and legal representatives, to abide by his decision in the premises.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

SAMUEL M. PLUMLEY.
THE UNITED STATES,
By B. F. TRACY,
Secretary of the Navy.

Signed and sealed in the presence of—
JOHN H. MCVEY.
R. E. LOGAN.

WM. B. REMEY,
Judge Advocate General.
As to B. F. TRACY,
Secretary of the Navy.

11 EXHIBIT B.

NAVY DEPARTMENT,
Washington, February 4, 1892.

SIR: Referring to the department's advertisement of the 7th ultimo inviting proposals for the completion of the new Naval Observatory, I have to inform you that your proposal, dated the 23rd ultimo, offering to complete said observatory for the sum of twenty-five thousand nine hundred and forty dollars ($25,940) is hereby accepted, and the contract for the performance of the work is awarded to you accordingly at the price above stated.

Enclosed herewith are forms of contract, and bond to accompany the same, for the completion of the new Naval Observatory, and it is requested that the same be executed in triplicate; that the contract and bond be sealed and signed by you in the presence of attesting witnesses; and that the bond be also sealed and signed by each of the sureties in the presence of attesting witnesses.

Enclosed also are the specifications for the construction and erection of the new Naval Observatory, which will be annexed to and form a part of the contract, and it is requested that they be signed by you in triplicate.

When the contract and bond have been duly executed, and the specifications have been signed in triplicate, in accordance with the foregoing instructions, please transmit the same to the department. The contract will then be executed on the part of the United States, and one of the triplicates thereof, together with one of the triplicates each of the bond and specifications accompanying the contract, will be returned to you.

12 You are requested to acknowledge to the department the receipt of this communication and its enclosures.

Very respectfully,

B. F. TRACY,
Secretary of the Navy.

Mr. S. M. PLUMLEY,
408 H Street NW., Washington, D. C.

13 *II. Statement of proceedings in this cause.*

This cause was argued by Mr. George A. King, for the claimant, and by Mr. W. W. Scott, for the defendants, on the 21st day February, 1906, and submitted.

On the 28th day of May, 1906, the court filed its findings of fact and conclusion of law and judgment was entered in favor of Samuel M. Plumley "in the sum of five hundred and two dollars and fifty cents ($502.50).

On the 15th day of October, 1906, the claimant filed a motion for a new trial, which was argued by Mr. Geo. A. King, for the motion, and by Mr. W. W. Scott, opposed, and submitted, and said motion was allowed by the court February 11, 1907.

On the 8th of January, 1908, the defendants filed the following traverse, to wit:

14 *III. Traverse.*

(Filed January 8, 1908.)

In the Court of Claims of the United States. December Term, A. D. 1908.

SAMUEL M. PLUMLEY
v.
THE UNITED STATES. } No. 20781.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

IV. Reargument and resubmission.

This cause was reargued by Mr. George A. King for the claimant and by Mr. W. W. Scott for the defendants, and resubmitted on the 8th day of January, 1908.

15 *V. Statement of further proceedings in the case.*

The court on the 9th day of March, 1908, withdrew its findings of fact of May 28, 1906, and filed new findings of fact and conclusion of law and an opinion, and ordered judgment to be entered as follows:

SAMUEL M. PLUMLEY
v.
THE UNITED STATES. } No. 20781.

At a Court of Claims held in the city of Washington on the 9th day of March, 1908, judgment was ordered to be entered as follows:

"The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that Samuel M. Plumley, the claimant, do have and recover of and from the United States the sum of five hundred and two dollars and fifty cents ($502.50)."

BY THE COURT.

On the 9th day of May, 1908, the defendants filed their motion for a rehearing and to amend the findings of fact filed March 9, 1908.

This motion was argued by Mr. W. W. Scott for the motion and by Mr. George A. King opposed, on the 9th and 10th days of February, 1909, and the case was against resubmitted.

16. *VI. Findings of fact, as finally amended, and conclusion of law.*

(Filed February 28, 1910.)

SAMUEL M. PULMLEY
v.
THE UNITED STATES. } No. 20781.

This motion was argued by Mr. W. W. Scott for the motion and upon the evidence, makes the following

FINDINGS OF FACT.

I.

On the 2d day of October, 1888, P. H. McLaughlin & Co., of Washington, D. C., entered into a contract with the United States for the erection of the buildings of the Naval Observatory. The contract is the same which was before this court in the case of P. H. McLaughlin & Co. v. United States (37 C. Cls. R., 150).

It contained, among other provisions, the following:

"Second. The construction and erection of said buildings, and all other work herein contracted for, shall conform in all respects to and with the plans, specifications, drawings, proposal, and letter aforesaid, which plans, specifications, drawings, proposal, and letter aforesaid are hereto annexed and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the parties of the first part, and all claims for extra compensation by reason of, or for or on account of, such extra performance are hereby, and in consideration of the premises, expressly waived.

"Third. If at any time during the prosecution of the work it shall be found advantageous or necessary to make any change or changes in the requirements of the drawings, plans, or specifications which may either increase or diminish the cost of the work, such change or changes must be agreed upon in writing by the parties of the first part and by the architect appointed by the Secretary of the Navy to superintend the work—the agreement to set forth fully the reason for such change or changes, to state clearly the quantities and prices of both material and labor thus substituted for those named in the plans and specifications, and, before taking effect, to be approved by the said Secretary: Provided, That the drawings, plans, or specifications shall not be changed in any respect when the cost of such change

shall exceed five hundred dollars ($500), except upon the written order of the Secretary of the Navy, and that, if changes involving an expenditure in excess of said sum thus made, the actual cost thereof, and the damage caused thereby, shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the parties of the first part shall be bound by the determination of said board or of a majority thereof, as to the amount of increased or diminished compensation which they shall be entitled to receive, if any, in consequence of such change or changes.

"Fifth. The materials and workmanship used and applied in the construction and erection of the buildings and their appurtenances and all other work required under this contract in details and finish shall be first class and of the very best quality, unless particularly set forth to the contrary in the drawings, plans, or specifications, and shall from the beginning to the end of the work be subject to inspection by such architects or inspectors as may for that purpose be designated by the Secretary of the Navy, it being hereby expressly understood, covenanted, and agreed that the said Secretary
17 may appoint suitable architects or inspectors to whom the parties of the first part shall furnish such samples and such information as to the quality thereof and the manner of using the same as may be required and also any assistance that may be required in determining the quality of the materials either used or intended for use in the construction of the buildings and their appurtenances; and that the architect may peremptorily reject any unfit material or forbid the use thereof, and that he shall at all times during the progress of the work have full access thereto, and that the parties of the first part shall furnish him with full facilities for the inspection and superintendence of the same; that only skilled, competent, and fit workmen shall be employed on the work and that the architect may, by written notice, require the parties of the first part to dismiss forthwith any employee he may deem incompetent, careless, or otherwise objectionable on the work; that the architect may also require the parties of the first part to remove such of their materials or work as in his opinion are not in accordance with the drawings, plans, or specifications and to substitute without delay satisfactory work and materials, and that the expense of doing so and of making good other work disturbed by the change shall be borne by the parties of the first part, who shall promptly carry out all such requirements, and that the decision of the architect superintending the work upon all questions concerning materials and workmanship shall be final, and that in case of the absence of the architect his duties may be performed by an assistant appointed by the architect with the approval of the Secretary of the Navy.

"Tenth. * * * The delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the work

within the period herein specified therefor shall entitle the parties of the first part to a corresponding extension of the period within which the work is to be completed: Provided, however, That no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the parties of the first part shall at the time of the occurrence of such delay notify him in writing of the facts and circumstances in each case and of the extent to which they claim that the final completion of the work is thereby delayed."

The total amount to be paid said P. H. McLaughlin & Co. was three hundred and seven thousand eight hundred and eleven dollars ($307,811), and by authorized additions thereafter made under subsequent agreements with them an additional sum of four thousand five hundred and thirty-nine dollars and fifty-seven cents ($4,539.57).

The total cost of the work included in the 31 subcontracts amounted to $7,891.13, but the changes set out in the subcontracts made a reduction in the contract price to the extent of $2,537.78, leaving to be paid the contractors for the extra work the said $4,539.57.

In addition to the cost of the extra work, as set out in the paragraph last above, McLaughlin & Co. were paid under another contract the sum of $5,485.70 for excavating and concreting for instrument piers, and to other contractors for work done in connection with the construction of the Naval Observatory buildings there was paid the sum of $32,888, including $8,580 paid to Warner and Swasey for the shutters of the prime vertical and of the three transit rooms.

On September 8, 1891, the Secretary of the Navy declared the McLaughlin contract forfeited for failure of the contractors to proceed with the work. The work was then readvertised, the advertisement being accompanied by the printed copy of the specifications of the McLaughlin contract with erasures showing the portions of the work completed.

The circular inviting proposals made the following statement in regard to such erasures, etc.:

"In view of the advanced condition of the work of completion of the new Naval Observatory, and in order to furnish, as fully as practicable, such information as to the present condition of the work as may be necessary for persons desiring to submit bids therefor, numerous manuscript notes and erasures have been made in these detailed specifications. Such alterations do not, however, constitute the 'duly authorized changes in the plans and specifications' that are referred to in the proposals for the completion of the new Naval Observatory, and the advertisement inviting the same, dated January 7, 1892, but are made solely for the assistance of bidders in making their estimates. They do not impair the requirements of the specifications as set forth in this circular and as amended prior to September 8, 1891."

The circular thus marked indicates the following, viz:

Letter A is placed opposite requirements which apparently have not been fulfilled in the least particular.

Letter B is placed opposite requirements which have apparently been partially fulfilled, the varying percentage of fulfillment or completion being approximately indicated by subnumerals, as B25, B50, B75.

18 The black lines drawn through requirements indicate that the work has probably been completed or that the requirement is probably specified elsewhere.

The condition of the authorized additional work or amendments to the specifications prior to September 8, 1891, is as follows: Clock room and transit circle rooms, B85; drain pipes and rain cesspools, A; cutting door for access to cellar, B50; extension of soil pipes to cesspools and east toilet room, B15.

The claimant became the accepted bidder and entered into the contract with the United States set forth as an exhibit to the petition, and carried out the contract.

II.

The claimant promptly proceeded to perform the work required by his contract and would have completed the same by June 1, 1892. He was delayed, however, in so doing by the defendants in not having the architect on hand promptly for decisions pertaining to the same. The contract time for the completion of the work was extended by the Secretary of the Navy to February 8, 1893, giving as a reason therefor that failure to complete the work within contract time was on account of circumstances beyond claimant's control. It is not shown that claimant suffered any loss by reason of said delay except the expenditure of $502.50, premiums paid upon insurance claimant was obligated to carry upon the work.

Neither is it shown that the claimant at the time of the occurrence of such delay notified the Secretary of the Navy in writing of the facts and circumstances thereof and the extent to which the final completion of the work would be thereby delayed.

III.

1. VENTILATION SYSTEM.

Some time after the work had been in progress by P. H. McLaughlin & Co. under the original contract, the architect employed by the Government to superintend the construction submitted the following paper to the department:

"MEMORANDUM NO. 1 OF PROPOSED CHANGES IN PLANS OF NEW NAVAL OBSERVATORY.

"The distances between the clock room and the east and west transit-circle room, as shown on the original location plan, should be reduced. This is made necessary by the fact that on the original a

large well comes directly under the east transit-circle room. This change involves no expense.

"Since by the above change the distance from the clock room to the observer's room is reduced to ten (10) feet, communication between them by covered passageway is made practicable at a comparatively small cost. By such communication the clock room will be entered through a passageway in which the temperature is practically the same as that of the clock room, which is a consideration of so much importance as to warrant even a greater expense than that entailed by the proposed change. The cellar of the clock room will be entered through cellar of passageway, which will add to the facilities for placing clock and mirror piers.

"The new position of doors with the suggested transoms will admit reflecting beams of light from the faces of the standard clocks to observers' room, to positions of chronographs, and to transit-circle rooms.

"It is the opinion of the authority of the Naval Observatory that these changes will be of very material benefit.

"Plans showing these changes are in the hands of the Superintendent of the Naval Observatory. They have been examined by the contractors (McLaughlin & Co.), who offer to make all changes according to plans and specifications prepared by me, at a total cost of nine hundred ($900) dollars.

"They will, upon the approval of the changes by the department, enter into a formal contract to do the work for the above amount."

Among the plans mentioned in the fifth paragraph of memorandum No. 1 as showing the changes and as having been examined by the contractors, McLaughlin & Co., was plan No. 79, which shows the ventilation work in the transit buildings. The date of memorandum No. 1 is May 2, 1889, and plan No. 79 was received by the contractors February 18, 1889, and were examined by Plumley before bidding.

The offer of the contractors above referred to was made in writing, was approved by a board of officers, and received the approval of the Bureau of Navigation and Secretary of the Navy. The work therein named was performed and paid for.

19 2. "SPECIFICATION REQUIREMENTS AS TO MATERIAL INSIDE AND OUT."

In four of the buildings covered by the specifications annexed to the contract of P. H. McLaughlin & Co., to wit, the three transit-circle rooms and prime vertical building, the specifications provided as follows:

"Main, east and west transit-circle, and adjoining main building, and prime vertical buildings. Construct frame of the side and the roof of rolled iron beams, channels, and angle irons of the sizes shown on the one-quarter-inch scale plan, properly riveted together and braced in the most substantial manner."

Extend the wall plate of 8-inch channel entirely around each building, anchor to masonry about every 4 feet with 1-inch stone or expansion bolts leaded into the coping.

Secure the beams and channel irons, uprights in the side, to wall plate with two four by three by three-eighths-inch angle-iron knees with two three-quarter-inch rivets in each.

Secure the horizontal girths of three by three by three-quarter-inch L irons, and two by two by one-quarter-inch L irons inside to the upright with one-half-inch rivets at each intersection.

Secure roof trusses and connections to framework of sides with five-eighths-inch rivets.

Punch or drill all necessary holes to secure firmly sheet iron, sheet zinc, or carpenter work.

Cover all rafters to finish the roof with best corrugated galvanized sheet iron, No. 22 gauge.

Cover the exterior of upright wall studs with best corrugated galvanized sheet iron, No. 24, and the interior throughout with corrugated sheet zinc, No. 12.

Paint all wrought-iron work one heavy coat of metallic paint and pure linseed oil before erection and one coat after.

Nothing was shown in said specifications or in the drawings accompanying the original contract of McLaughlin & Co. in regard to any provision for ventilation, but said ventilation work was fully set out on the drawings and plans which were shown to the claimant when estimating before bidding as stated in subfinding 1.

3. VENTILATION SYSTEM REQUIRED OF CLAIMANT.

The drawings showing the system of ventilation were handed to McLaughlin & Co. with instructions by the architect to proceed in accordance therewith, and they had proceeded a short distance in the construction in accordance with said drawings at the time their contract was forfeited, all of which was fully known to claimants at the time their bid for completion of the McLaughlin contract was accepted.

The claimant was required by the architect having charge of the construction of said observatory to put in a system of ventilation in accordance with the plan of Professor Paul. The claimant protested against being required to do the work on said ventilation system as a part of the "authorized changes" referred to in paragraph 2 of the contract. But said architect ruled that the work constituted a part of that shown in Memorandum No. 1 above, which the original contractors, McLaughlin & Co., had agreed to do for $900, and that it therefore constituted a part of the unfinished work of said McLaughlin & Co. which the claimant had assumed by his contract.

The changes mentioned in Memorandum No. 1 (set out in subfinding 1), were made for the agreed consideration of $900.

4. APPEAL TO SECRETARY OF NAVY.

Claimant appealed in writing to the Secretary of the Navy, claiming that the work was not included in that covered by Memorandum No. 1 of the supplemental contract of McLaughlin & Co. to do the work named in said memorandum, and insisted that he was entitled to be paid for the same. His letter is as follows:

"WASHINGTON, D. C., *May 12, 1892.*

"Hon. B. F. TRACY,

"*Secretary of Navy.*

"SIR: Under the ninth clause of my contract for the completion of the new Naval Observatory I desire to submit to your consideration and decision the contemplated changes in transit-circle buildings. The original drawings do not show the ventilation in the base of the buildings; details have been furnished by the architect entirely at variance with the original drawings or authorized changes, the cost of which will be about fifteen hundred dollars. An early decision on this matter will greatly oblige.

"Yours, respectfully, "S. M. PLUMLEY."

but the Secretary of Navy overruled claimant's contention and sustained the architect.

20

5. CHARACTER OF WORK.

Some time after the work had been begun under the contract of P. H. McLaughlin & Co. a plan was submitted by Prof. Henry M. Paul, U. S. N., for a system of ventilation designed to preserve the same temperature inside the buildings as outside, and with this in view, he submitted a plan for the construction of a ventilation system in substance the same as was afterwards carried out as follows:

SUMMARY OF NECESSARY CHANGES IN THE FIRST PLANS OF THE NEW NAVAL OBSERVATORY.

THE EAST AND WEST TRANSIT-CIRCLE ROOMS.

1. Turn roofs round so that shutter-opening will be along ridge of each.

2. Close up entirely the window and door in S. end of each room.

3. In the E. side of the E. room, and in the W. side of the W. room, replace the two windows of each with double-walled shutters opening outward in halves.

4. In the W. side of the E. room, and in the E. side of the W. room, replace the S. window with an 8-inch square transom, roofed and hooded (position specified in memorandum), and replace the N. window with door transferred from S. end.

5. In the N. end of each room, add wooden shutters on inside of the two windows.

6. On the outside of the N. end of each room, put thermometer shelter (position and details specified in memorandum).

7. Ventilate every panel of walls by open louvres at top and bottom in outside corrugated iron, and every panel of roofs by wire-covered openings at eaves and ridge, the latter outside of shutter opening.

8. In all four walls of each room, put two bottom panels of movable louvres in the inside zinc lining, these louvres to close dust-tight.

9. Cut out lower cross-tie of shutter openings, so that they will open down to next cross-tie.

10. Do away with the concrete and asphalt floors (specified on pp. 17 and 19 of the "Circular") throughout basements of each room, and fill the corners unoccupied by pier foundations with loose sand at least 12 inches deep. * * *

TRANSIT-CIRCLE ROOM ON WEST END OF MAIN BUILDING.

12. Turn roof round so that shutter opening will be along the ridge.

13. Close up entirely the two windows in S. end.

14. In the E. and W. sides replace the four symmetrically situated windows with double-walled shutters opening outward in halves.

15. On the W. side close up the small center window entirely, and in the same panel, as high up as it will clear the eaves put an 8-inch square transom, roofed and hooded.

16. In the N. end add wooden shutters on inside of the two windows.

17. On the outside of the N. end, put thermometer shelter (position and details specified in memorandum).

18. All the walls and roof to be ventilated just as described above in items 7 and 8 for the E. and W. transit circle rooms.

19. Cut out lower cross-ties, the same as specified in item 9. * * *

CLOCK ROOM AND TWO OBSERVERS' ROOMS.

22. The two observers' rooms (wooden) to be moved up within 10 feet of the clock room on each side, and to be connected with the latter by covered wooden passageways, with basements like basements of observers' rooms.

23. These passageways to have windows in N. and S. sides of each, a steam radiator under N. window of each, and two doors, with upper panel glass, swinging into each from clock and observers' rooms, with transom (size and height specified in memorandum) over each of the four doors. These doors replace four windows on plans.

24. The door in S. end of each observers' room to be moved to the side next to transit circle room in place of the window, and to have the upper panels of glass and to have transoms over the doors, these transoms to be roofed and hooded. The windows which these doors replace to be put in the center of S. end of each room.

25. A trapdoor in the floor, and steps to basement, in one corner of each of the two observers' rooms.

26. The steam radiator in each of the two observers' rooms not to be in the center, but preferably under the N. window.

27. In the floor of the clock room, opening to be left for 12 clock piers and 1 mirror post (according to plan submitted).

21 28. In the N. and S. gable ends of clock room, a ventilating opening with fixed louvres outside and movable louvres inside, and in the ceiling 4 ventilating registers with movable louvres, and a trapdoor for access to space over ceiling.

29. The S. door of clock room to have upper panel of glass, and over it a transom roofed and hooded.

30. The N. window of clock room to be double, with outside sash removable, and over the window a transom without roof or hood.

31. Do away with concrete floor in basement of clock room, and in the part of it not occupied by clock or mirror-post piers replace it with sand 12 inches deep.

IV.

The plans for the ceilings of the cellar rooms in the main building show plastering, and the general provisions of the specifications under the head of "Plastering and stucco work" required the contractor to "finish the plastering throughout in best three-coat work, done by skilled men," excepting the three transit circle rooms and the prime vertical building. The specifications also require that the great equatorial building and the clock rooms have the same construction as the main building. The drawings contain certain lines when plastering is required. Such plastering lines appear on drawing 16 of the main building under the main hallway and on plan 17 from the main front entrance to the main rear entrance.

The claimant was required to plaster the ceilings in the cellars of all the buildings, and did so, protesting against the requirement, but it was insisted by the local officers in charge that the contract required the ceilings to be plastered.

V.

The specifications of the McLaughlin contract, also constituting a part of this contract, contain under the head of "Concrete floors" the following:

"Concrete cellars throughout, without exception, also parts of areas flagged, with Portland-cement concrete, as above specified for foundations, not less than six (6) inches thick, and finish surface with a final layer of best imported Portland cement and fine-screened gravel. Trowel off smooth and mark with marking tool, and finish equal to granolithic pavement." The last sentence is erased in the copy of the specifications annexed to Plumley's contract.

Said specifications also contain the following:

"Asphalt.—Pave entire area of the cellar of main building, clock room, prime vertical and transit buildings, also of the great equatorial building over the concrete, with one (1) heavy coat of Seyssel or Neuchatel asphalt, not less than three-quarters (¾) inch thick, run clear to walls, and finished a good smooth finish."

The drawings annexed to the specifications, and thereby declared to constitute a part of the contract, showed only one layer of finish.

The claimant was required by the officers in charge under the direction of the Navy Department to put down over the concrete of these cellars a layer of Neuchatel asphalt in accordance with the specifications as above stated. The putting down of this asphalt on top of the concrete is of no advantage and is unusual in construction. Owing to the addition of the asphalt finish over the concrete, these cellar rooms when completed were and to-day are two inches less in height than as shown on the drawings.

The additional value and cost of this work was one thousand three hundred and eighty-nine dollars and forty cents ($1,389.40).

VI.

The specifications contain the following:

"Water supply.—From the main supply, at a point near the boiler house, carry a line of four (4) inch heavy cast-iron pipe in twelve (12) feet lengths to the main building near the library, then parallel to same to the great equatorial, then north to the rear of the clock room."

In addition to the main as thus laid, the contractors were also required to lay one hundred (100) feet more of the same character of pipe to a point one hundred feet south of the boiler house, against which the claimant protested, but was required to do the same.

The value of this work is one hundred and fifty dollars ($150).

VII.

LAYING FOUR-INCH DRAIN PIPE.

During the time that McLaughlin & Co. were at work under their contract they were requested by the Bureau of Equipment of the Navy Department to submit an estimate of labor and material for laying six hundred and fifty-five (655) feet of 4-inch vitrified
22 drain pipe. They offered to furnish such drain pipe at the rate of forty-eight (48) cents a foot, making three hundred and fourteen dollars and forty cents ($314.40), and their offer was accepted by the department. This order was afterwards officially countermanded.

The claimant was, after the date of his contract, requested to submit an estimate and he did so, proposing to do the work at the same price as had been named by McLaughlin & Co.

The claimant protested in writing to the Secretary of the Navy against being required to do this work as a part of his contract, but was nevertheless required to do it, and did it.

The reasonable value of the work was as proposed, amounting to three hundred and fourteen dollars and forty cents ($314.40).

"APRIL 19, 1892.

"Hon. B. F. TRACY,

"*Secretary of the Navy.*

"SIR: I desire to call your attention to the contracts for extra work entered into with P. H. McLaughlin & Co. for changes in buildings for new Naval Observatory, and ask you to define my status in reference to the extra work. My understanding of this matter was that all authorized changes were to be completed by me, and that I was to receive the percentage on the work not completed as estimated by the board of appraisers, as follows, from the aid of builders attached to the specifications or circular from which I bid:

"First. Clock room and transit-circle rooms is marked B 85, showing that the board of appraisers had estimated that 85 per cent of this work had been completed, leaving 15 per cent of the entire contract for this extra work yet to be done, and which I have estimated to receive when this work is finished by me.

"Second. Drainpipes and rain-water cesspools marked A, showing that McLaughlin & Co. have done nothing toward completing this extra work, and the entire work under this extra order will have to be completed by me; therefore I claim that on completion of the laying of these drainpipes and cesspools that I should receive the entire amount of this contract, less the value of the pipe left on hand by McLaughlin & Co., which should be credited to them. In further support of my claim for this particular work, I have been informed by Mr. P. H. McLaughlin, of the firm of McLaughlin & Co., that the order for this work was countermanded prior to the time that their contract was declared forfeited, and, in fact, on page 7 of the report of the board of apprai-ers, under the head of extra work, the drainpipes and cesspools is marked countermanded, and on page 2 of the inventory of the board of appraisers 655 feet of 4-inch pipe is marked extra order countermanded. I have also been requested by the architect, Mr. R. M. Hunt, through the assistant architect, Mr. Harry E. Donnell, to sign a proposal to do this work at the same price as allowed McLaughlin & Co. The request, however, since that time has been recalled. I simply mention these matters to strengthen my claim for extra compensation for this particular work.

"Third. Cutting door for access to cellar is marked B 50, showing that one-half of this work has been done by McLaughlin & Co., who should be credited with one-half of the amount allowed for this work, and the balance to be paid to me on its completion.

"Fourth. Extension of soil pipes to cesspools and east toilet rooms B 15, showing that 15 per cent of this work has been done by McLaughlin & Co., who should be credited with that amount, and the

balance to be paid to me on completion. This has been my understanding of the matter all the way through, and I am satisfied that it was the understanding of every bidder for the completion of the work. I request that you give me a decision on these points as soon as possible, and, if I have not made my statement as clear as you would wish, that I be allowed to make a verbal statement.

"Respectfully,

"S. M. PLUMLEY."

VIII.

EXTRA WORK IN LOBBY.

The claimant was likewise required, against his protest, to put in additional work, consisting of mill work, carpenter's work, plastering, and hardware, in the lobby between the main building and the small equatorial, nowhere described or called for in the specifications or the plans annexed thereto.

The value of this work was two hundred and fifty dollars ($250).

IX.

EXTRA WORK IN CORRIDOR.

The claimant was also required to do additional work of the same character described in the preceding finding in the corridor between the small equatorial and main transit buildings and, though protesting against the same, was required to do it and did do it.

The value of such additional work was fifty dollars ($50).

23

X.

WOODEN STEPS TO FIVE BUILDINGS.

The original plans showed wooden steps to the two observers' rooms, two transit rooms, and prime vertical building, showing simply a plain newel and a plain rail. The plans under which the claimant was compelled to put up those steps were shown to him in the shape of a modified plan, which he was required to follow. The difference in value was thirty dollars ($30) for each of the five flights, making a total of one hundred and fifty dollars ($150).

XI.

LAYING TILE FLOOR.

In the librarian's room in the main building McLaughlin & Co. had laid a wooden floor, and it had been finished and accepted prior to the date of the claimant's contract. This was in accordance with the specifications, which provided tiling for certain rooms but did not name among them the librarian's room. After the claimant

entered upon work under his contract he was required to remove the wooden floor already put in and put a tile floor on this room. The value of this work was ninety-two dollars ($92).

XII.

CONCRETE FLOORS IN OBSERVERS' ROOMS.

The original specifications and plans describe the observers' rooms as "each 18 x 20 feet interior measurement; one-story wood-frame building on foundation of masonry." No cellar was shown under these rooms. The claimant was required under protest to make cellars under these rooms and to concrete the floors thereof and did so.

The reasonable value of the work is one hundred and eighty dollars ($180).

XIII.

SAND PACKING.

During the currency of the McLaughlin contract, McLaughlin & Co. were called upon to estimate for packing sand around the instrument piers in the three transit rooms and prime vertical building, the construction of said piers being one of the works expressly excluded from the proposal and contract. McLaughlin & Co. submitted an estimate, but it was not acted upon before the termination of their contract. The claimant in this case was afterwards required by the officers of the Government in charge to put in sand packing around these piers, and did so. The value of the work was one hundred dollars ($100).

XIV.

SLATE AND IRON SADDLES.

The claimant was requested to submit an estimate for placing slate and iron saddles on the doors in the main building, and furnish an estimate for the same to the amount of one hundred and fifty dollars ($150). After he had submitted such estimate he was required to do the work, and did so. No saddles are specified in the specifications or shown in the plans. A saddle is a piece that goes across at the bottom of a door and over which the door shuts.

The value of this work was one hundred and fifty dollars ($150).

XV.

The court finds that Augustus Davis, jr., formerly a member of the firm of McLaughlin & Co., was likewise a partner of the claimant herein. His interest in the undertaking was one-half of the profits to be realized.

This arrangement was afterwards made known to the architect, Mr. Hunt, and received his sanction and cooperation. Mr. Davis superintended the work and for several months spent a great portion of his time there; was present at a conference with the assistant architect with reference to the slate and iron saddles named in Finding XIV, as well as at a conference with the superintendent of the observatory with reference to the finish of the floor, as set forth in Finding V, and was present at and participated in a hearing before the Judge Advocate General of the Navy on the appeal to the Secretary of the Navy from the requirement to put in the ventilation system, as set forth in Finding III, subfinding 4. The contract was executed in the name of Plumley and he was recognized by defendants as the sole contractor. The interest of Davis in the contract and the partnership between him and Plumley was entered into prior to the execution of the contract by Plumley with the defendants.

24 The sixth clause of the Plumley contract contains the following:

"It is mutually understood, covenanted, and agreed by and between the respective parties hereto that this contract shall not, nor shall any interest herein be transferred by the party of the first part to any other person or persons, and that any such transfer shall cause the annulment of this contract so far as the United States are concerned."

XVI.

It is not shown that the claimant appealed to the Secretary as required by the ninth clause of his contract as to any items, except those heretofore mentioned in Findings III and VII, or that any of the extra work for which claim is made herein, except as findings otherwise show, was ever before the Secretary of the Navy or a board of naval officers appointed by him in pursuance of section 3 of the original contract with McLaughlin & Co.

Neither is it shown that any of the alleged extra work charged for in claimant's petition and set out in the findings of fact was contracted for in writing in accordance with the terms of section 3 of the original contract with McLaughlin & Co., which by the first clause of the Plumley contract was made a part of the contract involved in this case.

It is shown that the extra work charged for was performed by the claimant under protest and after various disputes with the officer in charge of the work as to constructions of plans and specifications; but it does not appear that claimant sought relief therefor in manner and form as provided in original contract with McLaughlin & Co. and the ninth clause of his contract, except as appears in Findings III and VII. Claimant performed the work under direction of the officer in charge and in accordance with his construction of the contract, plans, and specifications.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment from the United States, on Finding II, in the sum of five hundred and two dollars and fifty cents ($502.50). The petition as to all other items is dismissed on authority of the case of McLaughlin (37 C. Cls., 150).

BY THE COURT.

25 *VII. Opinions of the court.*

(a) Opinion filed March 9, 1908.

OPINION.

BOOTH, J., delivered the opinion of the court:

Samuel M. Plumley, the claimant herein, entered into an agreement to complete the new Naval Observatory on Georgetown Heights. The contract for the erection of the buildings had originally been let to P. H. McLaughlin & Co., in October, 1888. On September 8, 1891, the Secretary of the Navy declared the McLaughlin contract forfeited and immediately issued a public invitation for proposals for the completion of the McLaughlin contract. Claimant was the successful bidder and executed the contract in suit accordingly. Claimant's contract was coextensive with the McLaughlin agreement and obligated him to carry forward the unfinished construction as provided by the terms of the McLaughlin contract and "all authorized changes therein."

The claim now presented is for delay and extra work, alleging that the items set forth in the petition were not authorized changes within the meaning of the McLaughlin contract. The present controversy in most respects is fully determined by the case of McLaughlin & Co. v. United States (37 C. Cls., 150). The court in that case discussed at length the various provisions of the McLaughlin contract and its judgment therein forestalls recovery for all the items herein claimed for except Finding II. Clause 3 of the McLaughlin contract (Finding I) provided a mode for making changes in the drawings, plans, and specifications which might either increase or *or* diminish the cost of the work to the contractor. If the change involved a cost in excess of $500 it could not be made except upon the written order of the Secretary of the Navy and required the appointment of a board of naval officers by the Secretary to determine the actual cost of such a change to the contractor. If the cost of the contemplated change was less than this amount an agreement in writing between the contractor and the architect appointed by the Secretary of the Navy was indispensable.

Prior to the forfeiture of the McLaughlin contract a change was made therein as set forth in memorandum No. 1 (Finding III), and

McLaughlin & Co. had completed the work required thereunder and received the compensation provided therein. The architect in charge of the work required the claimant to install in some of said buildings a new and quite elaborate system of ventilation, insisting that the requirements therefor were fully covered by the terms of memorandum No. 1; that the same was a duly authorized change under the McLaughlin contract, and hence denied him pay therefor.

Claimant appealed to the Secretary of the Navy, protesting against the requirements of the architect and requesting his decision thereon. The Secretary of the Navy affirmed the decision of the architect and required the contractor to perform the work. The findings disclose that the ventilation system was not embraced in memorandum No. 1 and was not an authorized change in the McLaughlin contract.

The ninth clause of the Plumley contract, however, precludes recovery for this item. By this clause provision is made for the determination of any discrepancy between the plans, specifications, contract of October 2, 1888, and this contract. The parties obligated themselves to submit any such disputes to the Secretary of the Navy, and his decision thereon was final. In addition to the conclusiveness of the ninth clause, it appears that the claimant herein was fully aware of the construction placed upon memorandum No. 1, both by the Secretary of the Navy and McLaughlin & Co. prior to the execution of the contract in suit. Claimant well knew that said ventilation system was being installed by McLaughlin & Co. as a part of memorandum No. 1, and made no protest or exception to carrying forward said work at the time he executed the contract. He can not after the execution of his contract for the first time be heard to complain of the imposition of work and labor under the terms thereof which he must have known and did know at the time were intended as a part of his undertaking. His silence when it was his duty to speak effectually estops him from speaking when it is to his interest to speak. (Alvord v. United States, 8 C. Cls. R., 364, and authorities there cited.) In contracts of this nature the parties may contract to submit certain disputes to the Secretary of the Navy, in authority over the whole undertaking, and provide therein as to the finality of his decision. (See P. H. McLaughlin & Co., supra, and authorities cited therein.)

The expenses incident to delay, as set forth in Finding II, come within the McLaughlin case and will be allowed. All other items claimed for in the petition will be disallowed.

The circumstances under which said work was performed are fully set forth in Finding XVI and come within the disallowances made in the McLaughlin case, supra.

Judgment will be awarded claimant for $502.50, and in all other respects the petition is dismissed.

BY THE COURT.

26 (b) Opinion filed February 28, 1910.

OPINION.

BOOTH, J., delivered the opinion of the court:

This case in some respects has had a checkered career. It has been under consideration by the court for some time, and because of its peculiar complications and close relation to the McLaughlin case has involved an extended and detailed examination into the records of both cases. This has been tedious. The case is now before us upon the defendants' motion to amend the findings. No objection is raised as to the amount of the judgment of the court. This is the first motion of the defendants to amend findings, and extends to nearly all the findings previously filed.

Strenuous objection was interposed by claimant to consideration of the present motion, but the court is of the opinion that until the granting of an appeal the court retains jurisdiction over its findings and can entertain motions from either side to amend the same. In addition to this, section 1088 of the Revised Statutes is exceedingly broad in reference to rehearings and grants a much wider latitude than is usually granted to litigants in the prosecution or defense of suits before a court. While the motion in this case recites upon its face that it is a motion to amend findings, the court has always treated such motions as motions for a new trial and may come under section 1088, supra.

The motion in this case was filed in apt time preceding the application for an appeal by claimant, and was argued in the usual course of procedure and submitted as other motions are submitted under the rules of this court. We do not mean to say that innumerable motions may be filed by any single side to the litigation, but if in the wisdom of the court a sufficient showing is made in a motion so filed the court will entertain the same if a previous motion of the same character from the same side has not been heard. This is not in conflict with the rules of the Supreme Court and has been the practice of this court for all time.

The principal controversy herein goes to Finding III, Memorandum No. 1. In the previous findings and opinion of this court it was then its judgment that Memorandum No. 1 did not include the ventilation system, and was not an authorized change under the terms of the McLaughlin contract. After going over the records in both cases again, and after a most careful comparison and examination of the plans and specifications, especially plan No. 79, construed in conjunction with the summary of changes, the court modifies its findings and opinion heretofore filed. Plan No. 79 was in the hands of claimant previous to his bid and when taken in connection with the summary of changes submitted to McLaughlin & Co., at the time of the submission of the plan of ventilation, it confirms defendants' contention that the ventilation system was included in memorandum No. 1. The court's first impression was that memorandum No. 1

was limited to the changes made in the distances between the clock room and the east-and-west transit circle room, overlooking the summary of changes wherein these identical changes are expressly provided for.

The additional modifications go to some minor details and are not numerous or important enough to warrant further discussion. The amendments made do not in any wise affect the conclusion of the court as formerly expressed, and with the exception of the ventilation system leave undisturbed the former opinion and judgment of the court.

The Alvord case (8 C. Cls., 364) was cited for the purpose of reference to a line of authorities sustaining the general doctrine that "no one is permitted to keep silent when he should speak, and thereby mislead another to his injury." As to this well-established rule no extended comment is necessary. The case was not otherwise apropos and its citation not otherwise intended.

The court can not do otherwise than regret the necessity for this additional change in the findings and former opinion. It has involved much delay and labor. Justice is exacting, its attainment the paramount object, and in its interest courts must yield when convinced of error.

The defendants' motion to amend findings is allowed in part and overruled in part.

The former findings are withdrawn, and judgment set aside and new findings filed, which, together with the former opinion as modified by this opinion, will constitute the conclusions of the court. Judgment awarded the claimant in the sum of $502.50.

In all other respects the petition is dismissed.

BY THE COURT.

27 *VIII. Final judgment of the court.*

SAMUEL M. PLUMLEY
vs.
THE UNITED STATES. } No. 20781.

At a Court of Claims held in the city of Washington on the 28th day of February, 1910, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, finds for the claimant, and do order, adjudge, and decree that Samuel M. Plumley, the claimant, do have and recover of and from the United States the sum of five hundred and two dollars and fifty cents ($502.50).

BY THE COURT.

28 *IX. Application of claimant for, and allowance of, an appeal.*

(Filed April 4, 1910.)

SAMUEL M. PLUMLEY
v.
THE UNITED STATES. } No. 20781.

From the judgment rendered in the above-entitled cause on the 28th day of February, 1910, the claimant, by his attorneys of record, on the 4th day of April, 1910, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

Filed April 4, 1910.

Whereupon now, to wit, April 4, 1910, it is ordered that the appeal be allowed as prayed for.

BY THE COURT.

29 *X. Application of defendants for the allowance of appeal.*

SAMUEL M. PLUMLEY
vs.
THE UNITED STATES. } No. 20781.

From the judgment rendered in the above-entitled cause on the 28th day of February, 1910, in favor of the claimant, the defendants, by their Attorney General, on the 7th day of April, 1910, made application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney General.

Filed April 7, 1910.

Whereupon now, to wit, April 7, 1910, it is ordered that the appeal be allowed as prayed for.

BY THE COURT.

30 In the Court of Claims.

SAMUEL M. PLUMLEY
vs.
THE UNITED STATES. } No. 20781.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact and conclusions of law filed by the court, of the final judgment of the court, of the

opinions of the court, of the application of the claimant for and allowance of appeal to the Supreme Court of the United States, of the application of the defendants for and allowance of their cross appeal to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 14 day of April, 1910.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) File Nos. 22107 and 22108. Court of Claims. Term No., 255, Samuel M. Plumley, appellant, vs. The United States, and term No., 256, The United States, appellant, vs. Samuel M. Plumley. Filed April 16, 1910. File Nos. 22107 and 22108.

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Supreme Court of the United States.

October Term, 1911.

SAMUEL M. PLUMLEY, *Appellant*, v. THE UNITED STATES. } No. 255.

THE UNITED STATES, *Appellant*, v. SAMUEL M. PLUMLEY. } No. 256.

BRIEF FOR SAMUEL M. PLUMLEY.

I. Statement of the Case.

The claimant, Samuel M. Plumley, brought this action in the Court of Claims upon a contract with the Navy Department dated February 16, 1892, for the completion of the new naval observatory on Georgetown heights, Washington, D. C. There had been a previous contract for the erection of this building with P. H. McLaughlin & Company, which had been declared forfeited by the Secretary of the Navy for lack of proper progress September 8, 1891.

The contract with Plumley, the claimant herein, was for the completion of the work left unfinished by P. H. McLaughlin & Co. The stipulated price for completion was $25,940. This suit was for the recovery of damages for delay caused to the contractor in the completion of the contract on the part of the Government and for a large number of items of extra work.

The contract with the claimant provided (paragraph first, p. 4) that the work should be completed "under

the aforementioned contract with P. H. McLaughlin & Company in conformity with and subject to the conditions stated in said contract and the drawings, plans, specifications (and duly authorized changes therein), proposal of the said P. H. McLaughlin and Company, dated June 12, 1888, and letter of the Secretary of the Navy dated June 29, 1888, accepting said proposal, annexed to said contract, and will deliver said buildings, coal vault, conduit or tunnel, and all other work, complete in all respects as required by said contract, drawings, plans and specifications (and duly authorized changes therein), proposal, and letter," etc.

Among the provisions of the McLaughlin contract is paragraph third (made a part of Finding I, pp. 9, 10), requiring the change to be agreed upon in writing between the contractor and the architect appointed by the Secretary of the Navy to superintend the work and that the drawings, plans, or specifications, shall not be changed when the cost of the change exceeds $500, except upon the written order of the Secretary of the Navy, and upon the determination of a board of naval officers as to the cost thereof, and the amount of increased or diminished compensation which the contractor shall be entitled to receive in consequence of such changes.

No formal contract for changes was made in accordance with this provision. The findings of fact show, however, that a large amount of work was done by the claimant outside of the plans and specifications of the contract. The most important one of these was what is known as the "ventilation system," covered by Finding III (pp. 12–17). This finding may in substance be abridged as follows:

During the lifetime of the McLaughlin contract, the government architect submitted a paper to the Department styled "Memorandum No. 1 of Proposed Changes in Plans of New Naval Observatory," in which he set

forth that the distance between the clock room and the east and west transit-circle rooms as shown on the original location plan, should be reduced, but that this change involved no expense. That since by the above change the distance between the clock room and the observer's room is reduced to ten feet, communication between them by covered passageway is made practicable at a comparatively small cost. This passage was therefore provided for, and it was said that "the new position of doors with the suggested transoms will admit reflecting beams of light from the faces of the standard clocks to observer's room, to positions of chronographs, and to transit-circle rooms."

The "memorandum" proceeds:

"'Plans showing these changes are in the hands of the Superintendent of the Naval Observatory. They have been examined by the contractors (McLaughlin & Co.), who offer to make all changes according to plans and specifications prepared by me, at a total cost of nine hundred ($900) dollars.

"'They will, upon the approval of the changes by the department, enter into a formal contract to do the work for the above amount.'

"The court finds:

"Among the plans mentioned in the fifth paragraph of memorandum No. 1, as showing the changes and as having been examined by the contractors, McLaughlin & Co., was plan No. 79, which shows the ventilation work in the transit buildings. The date of memorandum No. 1 is May 2, 1889, and plan No. 79 was received by the contractors February 18, 1889, and were examined by Plumley before bidding.

"The offer of the contractors above referred to was made in writing, was approved by a board of officers, and received the approval of the Bureau of Navigation and Secretary of the Navy. The work therein named was performed and paid for (record, p. 13, end of paragraph 1, Finding III)."

Paragraph 2 of this finding (pp. 13, 14) quotes the parts of the specifications annexed to the McLaughlin contract, showing the mode of constructing the sides of several buildings which were to be of corrugated iron "properly riveted together and braced in the most substantial manner." It is stated at the end of paragraph 2 of this finding (middle of p. 14):

"Nothing was shown in said specifications or in the drawings accompanying the original contract of McLaughlin & Co. in regard to any provision for ventilation, but said ventilation work was fully set out on the drawings and plans which were shown to the claimant when estimating before bidding as stated in subfinding 1."

Paragraph 3 of this finding (p. 14), entitled "Ventilation System Required of Claimant," states:

"The drawings showing the system of ventilation were handed to McLaughlin & Co. with instructions by the architect to proceed in accordance therewith, and they had proceeded a short distance in the construction in accordance with said drawings at the time their contract was forfeited, all of which was fully known to claimants at the time their bid for completion of the McLaughlin contract was accepted.

"The claimant was required by the architect having charge of the construction of said observatory to put in a system of ventilation in accordance with the plan of Professor Paul. The claimant protested against being required to do the work on said ventilation system as a part of the 'authorized changes' referred to in paragraph 2 of the contract. But said architect ruled that the work constituted a part of that shown in Memorandum No. 1 above, which the original contractors, McLaughlin & Co. had agreed to do for $900, and that it therefore constituted a part of the unfinished work of said McLaughlin & Co. which the claimant had assumed by his contract.

"The changes mentioned in Memorandum No. 1 (set out in subfinding 1), were made for the agreed consideration of $900."

The claimant appealed in writing to the Secretary of the Navy, claiming that the work was not included in that covered by "Memorandum No. 1," but the Secretary of the Navy overruled the claimant's contention and sustained the architect (paragraph 4, p. 15).

The plan for the construction of this ventilation system is given in paragraph 5 of this finding (pp. 15–17), and shows an elaborate system of openings fitted with shutters.

The cost of these changes was stated by the claimant in his letter of protest and appeal to the Secretary of the Navy to be $1,500 (record, p. 15). On the previous hearing of this case the court found that to be the value of the work (Finding III, 43 C. Cls. 274). On the last hearing and in the findings sent up, no finding is made as to the amount.

There are other items of extra work stated in the succeeding findings. All the items may be tabulated as follows:

Finding.	Page of Record.	Character of Work.	Value.
III	12–17	Ventilation System	$1,500.00
V	17, 18	Putting down layer of Neuchatel asphalt over concrete	1,389.40
VI	18	100 feet of additional cast iron pipe	150.00
VII	18–20	Laying 4-inch drain pipe . .	314.40
VIII	20	Extra work in lobby	250.00
IX	20	Extra work in corridor . . .	50.00
X	20	Wooden steps to five buildings	150.00
XI	20, 21	Laying tile floor	92.00
XII	21	Concrete floors in observers' rooms	180.00
XIII	21	Sand packing	100.00
XIV	21	Slate and iron saddles	150.00
		Total	$4,325.80

The extra work " was performed by the claimant under protest and after various disputes with the officer in charge of the work as to constructions of plans and specifications; but it does not appear that claimant sought relief therefor in manner and form as provided in original contract with McLaughlin & Co. and ninth clause of his contract, except as appears in Findings III and VII. Claimant performed the work under direction of the officer in charge and in accordance with his construction of the contract, plans, and specifications." (Finding VI, p. 22.)

The court also finds (Finding XV, pp. 21, 22) that Augustus Davis, a former member of the firm of McLaughlin and Company, was interested in this contract to the extent of one-half the profits thereof, and that this arrangement was made known to the government architect, and received his sanction and cooperation, and that said Davis proceeded in a number of conferences with the officers of the Government relative to questions arising in the execution of the contract.

The case was tried three times before the Court of Claims, resulting on each occasion in a judgment in favor of the claimant for $502.50, covering the item of damage by delay, the amount being the increased premium of insurance which the claimant had to pay during the additional time of work occasioned to him by the architect of the Government not being on hand promptly for decisions pertaining to the work (Finding II, p. 12). The case is reported 43 C. Cls. 266, and 45 C. Cls. 185.

All the items for extra work were disallowed on the ground that the changes were not ordered or their cost fixed in the manner provided by the contract.

As regards the ventilation system, the court was also of the opinion that, as a plan showing that system was

in the hands of the claimant previous to making the bid, he was estopped from denying that that system was included within the "authorized changes" made by Memorandum No. 1.

Both parties have appealed to this court.

II. Assignments of Error.

The appellant hereby assigns the following errors in the judgment of the Court of Claims:

1. That said court refused the appellant all recovery for work done in putting in the ventilation system described in Finding III (record, pp. 12–17).

2. That said court refused the appellant all recovery for any of the other items of extra work as fully set forth and described in Findings 5–14, inclusive (pp. 17–21, tabulated above, *ante*, p. 5).

III. Brief of Argument.

Allowance for Delay, $502.50.

The court allowed the sum of $502.50 as the damage caused to the claimant in the way of additional insurance premiums by reason of the delay of the Government in having its architect on hand to give instructions during the progress of the work. The finding supporting this item and the only one for which the court gave judgment in favor of the claimant is Finding II (p. 12). The allowance of this item of damage is so clearly covered by repeated decisions of this court as hardly to require argument to sustain it.

The case is in every respect similar in principle to *United States* v. *Smith*, 94 U. S. 214, followed in *United States* v. *Mueller*, 113 U. S. 153; *United States* v. *Barlow*, 184 U. S. 124, 137.

The latest case is *Cramp Co.* v. *United States*, 216

U. S. 494. The exact character of the items for which this court in that case allowed the claimant about $50,000 damages (conclusion of opinion, p. 504) is shown in detail in the findings of the Court of Claims, showing how that amount is made up (43 C. Cls. 212–216, Finding XVIII). It there appears that the claim so allowed consisted entirely of damages caused by the delays of the United States. Out of the amount so found by the Court of Claims and allowed by this court, $7,790.32 consists of cost of insurance (43 C. Cls. middle p. 214). The case is, therefore, a complete authority for the present one.

The portion of the judgment allowing this item is, therefore, clearly right and should be affirmed.

Ventilation System.

The item principally contested in the court below was the one arising out of the requirement made upon the claimant for what is known as the "ventilation system," for which compensation is claimed as for extra work not within the terms of the contract.

This ventilation system was not within the terms of the original contract and specifications of P. H. McLaughlin & Co., whose unfinished work the claimant agreed by his contract to execute.

The requirement of the contract made by the claimant was to complete the construction, erection and finishing of the buildings under the McLaughlin contract "and the drawings, plans, specifications and duly authorized changes therein" (paragraph 1st, of Plumley contract, record, p. 4).

The words "duly authorized changes therein" clearly refer to the provision made by the McLaughlin contract (paragraph third, pp. 9, 10) that the change or changes must be agreed upon in writing by the parties of the first

part and by the architect appointed by the Secretary of the Navy to superintend the work. Also that when the cost exceeds $500 there must be a written order of the Secretary of the Navy, the cost of the change to be ascertained by a board of naval officers and the contractors to be bound by the determination of that board as to the amount of increased or diminished compensation which they shall be entitled to receive.

A brief memorandum was drawn up by the architect which is embodied in Finding III (pp. 12, 13) showing that it was desired to reduce the distances between the clock room and the east and west transit-circle rooms. The mere reduction in the distance involved no expense. But a covered passageway was to be provided which, together with a new position of doors with the suggested transoms will admit reflecting beams of light from the faces of the standard clocks to observer's room to positions of chronographs and to transit-circle rooms, Finding III (p. 13).

It is stated that plans showing these changes "have been examined by the contractors (McLaughlin & Co.) who offer to make all changes according to plans and specifications prepared by me at a total cost of $900. They will, upon the approval of the changes by the Department, enter into a formal contract to do the work for the above amount." No such formal contract seems to have been made.

The memorandum is dated May 2, 1889 (middle p. 13). The offer of the contractors, McLaughlin & Co., "was made in writing, was approved by a board of officers, and received the approval of the Bureau of Navigation and Secretary of the Navy. The work therein named was performed and paid for."

The work had thus been performed by the original contractors, McLaughlin & Co. They having received

payment for the same, the present claimant is surely in a position to assert that he is not bound to do any additional work claimed to have been within the terms of Memorandum No. 1, which McLaughlin & Co. agreed to do on the terms named in that memorandum.

His agreement was only to complete the work called for by McLaughlin's original contract, and such "authorized changes" as should have been made in it.

It is claimed, however, that he assumed to do this work as a portion of the "authorized changes" because a plan showing the ventilation work in the transit buildings was in existence, having been dated February 18th, 1889, prior to the date of Memorandum No. 1, which was May 2, 1889, and that plan was examined by McLaughlin & Co., and was also examined by Plumley before making his bid.

The answer to this proposition is that the contract of Plumley, the claimant, was based upon an advertisement as required by law (recital in contract, near top p. 4). His obligation (paragraph first, p. 4) was to complete the work called for by the McLaughlin contract, and the plans and specifications annexed thereto, none of which included this ventilation system, "and duly authorized changes therein" (middle p. 4). It can hardly be claimed that this change was one "duly authorized" by the contract within the sense of this provision. If so, it would have been annexed to the contract as a part thereof.

But it is said that the claimant is estopped from claiming that this ventilation system was not a part of McLaughlin's contract, which he had agreed to complete, because a plan known as No. 79 was examined by him, Plumley, before bidding. To this we answer that it makes no difference what he examined or did not examine when bidding, outside of the contract plans and speci-

fications. If the advertisement had been an original one for the performance of this work, nothing but the plans and specifications upon which the bids were based, and which were later annexed to the contract would control.

So, when the bid was based upon the McLaughlin contract with its accompanying plans and specifications, the agreement was simply to complete the work required thereby. The only obligation assumed by the claimant was to complete in accordance with those plans and specifications.

Moreover, the work under Memorandum No. 1, as has been expressly found, was not only completed by McLaughlin & Co., but had actually been paid for. Surely, it was not open to the Government to claim on re-letting the work to the present claimant, that there was an unfinished part of the extra work required of McLaughlin & Co. for which McLaughlin & Co. had already received the full stipulated compensation. The doctrine that the claimant is estopped by his examination of a plan from denying that the ventilation system was a portion of the work covered by his contract can not be sustained.

There can be no estoppel arising from the fact that the claimant examined a plan showing the ventilation system prior to bidding. This plan was not a portion of the letting plans. No reference is made to it in the specifications or contract. There was no "meeting of minds" upon it, as this court has defined it in *United States* v. *Ellicott*, No. 85 of the present term. The case of *Alvord* v. *United States*, 8 C. Cls. 364, referred to by the Court of Claims in support of this position was reversed by this court on appeal (95 U. S. 356).

In *United States* v. *Gibbons*, 109 U. S. 200, affirming 15 C. Cls. 174, the court said (p. 204): "We lay no stress, as the Court of Claims did not, on what was said at the time to that effect by unauthorized subordinates."

The fact that a plan showing this ventilation system had been handed to McLaughlin & Co. before the forfeiture of their contract is entirely without legal force. The law provides (Rev. Stat. Sec. 3709):

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service."

The preamble to this contract (record, top p. 4) shows that it was so advertised. The contract, together with the drawings, plans and specifications made with the former contractors, McLaughlin & Co., were annexed to the Plumley contract, and were made a part thereof. They "are herewith annexed and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein" (contract, paragraph second, p. 4). It was, of course, essential that in advertising for proposals for the completion of the work covered by the McLaughlin contract, all the drawings, plans and specifications on which bids were to be based should be shown to the intending bidders.

According to that high authority, Judge Dillon, in his Work on Municipal Corporations (5th edition, 1911, sec. 807):

"§ 807. Necessity for and sufficiency of specifications.—When by charter or statute a municipality can only let its contracts to the lowest bidder after advertisement, an implied condition and restriction is placed upon the proceedings of the municipality that the various steps adopted by it to let a contract shall be of such a nature and taken in such form as *in good faith* to invite competition.

"Hence, persons bidding must bid upon a uniform basis, and the municipality must take steps to determine in advance the nature of the improvement, the material of which it is to be constructed, and to ascertain all those facts which are necessary to enable an intending bidder to comprehend the scope of the improvement and the nature of the supposed contract, and bid accordingly. Therefore, something in the nature *of a specification* of the material or of a plan and specification for the improvement *must be adopted by the municipality* prior to inviting bids. This specification in the case of a contract for an article of general use is undoubtedly satisfied by describing it by its trade name, but in the case of an expensive and complicated improvement *plans and specifications* setting forth the improvement in sufficient detail to enable competitors to bid must be adopted before advertisement. This is the rule whether the statute expressly requires plans and specifications to be furnished or is silent thereon, merely imposing the general duty upon the municipality to advertise for bids and to let the contract to the lowest bidder." (Italics are the author's.)

And at the end of Sec. 807 he says:

"The rule that the contract must conform to the plan, specifications, bid, and advertisement applies, although but one bid was made, and although there is no allegation or suggestion of fraud, and although the change made in the contract is to the advantage of the city."

In completing the construction of this work, the several bidders were bound to base their proposals upon the drawings, plans and specifications annexed to the McLaughlin contract. These are the only ones referred to in the new contract, and the only ones upon which the advertisement of the Government or the proposals of the bidders were or could be lawfully based.

It is said, however, that the claimant submitted the question arising on this claim to the Secretary of the Navy under the provisions of paragraph ninth of the contract (record, p. 6):

"If any discrepancy appear between the drawings, plans, specifications, proposals, letter, or contract of October 2, 1888, aforesaid, and this contract the matter shall be at once referred to the Secretary of the Navy for determination and the party of the first part hereby binds himself, his heirs, and assigns, and his personal and legal representatives, to abide by his decision in the premises."

This provision may authorize the Secretary of the Navy to determine questions arising on the construction of the specifications, but surely not to require of a contractor the performance of a large amount of extra work nowhere alluded to in the specifications by a mere assertion that it is within them.

This question was considered by the Circuit Court of Appeals for the 8th Circuit in *Salt Lake City* v. *Smith*, 104 Fed. Rep. 457, where paragraph of the syllabus (p. 458) is as follows:

"The stipulation in such contracts that any questions, differences, or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to an arbiter, and that his decision thereof shall be final and conclusive upon both parties, gives the arbiter no jurisdiction to determine that work or materials which were not covered by the contract were furnished under it, and his decision to that effect is nugatory."

It was said in the United States Circuit Court for the Eastern District of Missouri:

"The contract made the decision of the Street Commissioner conclusive as to all questions concerning the amount of work done, provided he acted in good faith and with reasonable care and circumspection. With the same reservations, that he acted in good faith and with reason-

able care, it also made his decisions final as to all questions whether the work was done in accordance with the drawings and specifications and was fully up to the standard of excellence mentioned therein. These were all questions of fact depending for their correct solution on professional knowledge and skill; and the parties might reasonably and lawfully submit them to the determination of an arbitrator and agree to be bound by his decision.

"But the question which the Street Commissioner undertook to decide was purely a question of law, as to the effect which the failure of the City to have the bridge piers completed within one year and ten months after notice was served based upon its right to demand liquidated damages. I am satisfied that the contract, properly construed, did not commit the question to the determination of the Street Commissioner; it was wholly outside of his jurisdiction."

King Iron Bridge & M. Co. v. *St. Louis*, 43 Fed. Rep. 768, at page 770.

In a later decision in the same court it was held:

"If it appears that the engineer in charge put a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the proper interpretation of the contract final and conclusive. It is the province of the court to construe the agreement."

Lewis v. *Chicago S. F. & C. Ry. Co.* 49 Fed. Rep. 708, at page 710.

The same principle, but more comprehensively stated, has been adopted by the Court of Claims as follows:

"The provision in the contract that 'the decision of the engineer officer in charge as to the quality and quantity shall be final,' refers only to his measurement in point of fact, and not to the principle of law on which it is made, as *it is the province of the court to determine the law of the contract.*"

Lyons v. *U. S.* 30 C. Cls. 352, at page 365.

A comparison of the elaborate description of this ventilation system submitted by Professor Henry M. Paul, U. S. Navy (set forth in paragraph 5, of Finding III, pp. 15–17, and consisting of 31 numbered paragraphs), shows how entirely it is outside of the description contained in Memorandum No. 1 (paragraph 1, pp. 12, 13).

An elaborate system of ventilators and shutters are provided for, and this it is that the claimant objected to furnishing. It matters not that the plans may have been in the hands of McLaughlin & Co. They had done the work required by Memorandum No. 1 (pp. 12, 13), and had been paid for it. The claimant was therefore under no obligation to do this additional work of furnishing a ventilation system. His bid was based entirely upon the plans and specifications of the McLaughlin contract, and no bid not based on the precise plans and specifications shown to him would have received any consideration whatever.

A mere drawing means little to a builder in the absence of definite specifications. An able English work defines them:

"Specifications.—The specification of an intended work is the written description of such work, by means of which and the drawings the builder is able to form an estimate of the cost, and also to carry out the work to completion. *Specification*, under the Roman law, meant the application of labor to materials, but in connection with the science and practice of construction, the specification is the written description of the intended work or building. In general terms, the drawings indicate the dimensions and shape, while the specification describes the nature and quality of the material to be used in the intended work or building. It will, of course, be apparent that accuracy in the specification is essential, and a certain degree of fullness is also requisite. Where the description of a portion of work is very general and

meagre, parties tendering will naturally interpret the description in a way very different to that the author of the specification intended" (Macassey & Strahan, Civil Engineers, p. 51).

The requirements of specifications have also been learnedly defined in a very recent case by the Supreme Court of Idaho, *Nave* v. *McGrane*, 113 Pac. Rep. 82.

The work having been done under the direct orders of the Secretary of the Navy, the claimant is clearly entitled to be paid for it under the doctrine laid down by this court in *United States* v. *Barlow*, 184 U. S. 123, 136, 137:

"We do not think that the order of the Secretary of the Navy directing the experiment with the water-jet system was a 'change or modification' of the contract within the sense of subdivision seven. It was an exercise of superintendence and unwarrantable superintendence. The experiment was forced upon the contractors. They were powerless to do anything but protest and yield. The interference with the work of driving the piles by the drop-hammer process was an improper interference, and brings the claim of the contractors within the rule in *Clark's* case, 6 Wall. 546; *Smoot's* case, 15 Wall. 47; the case of the *Amoskeag Company*, and within the ruling of *United States* v. *Smith*, 94 U. S. 214, where the other cases are cited and approved."

The value of this work was stated by the claimant in his letter of protest to the Secretary of the Navy as $1,500 (paragraph 4, p. 15). It was so found by the Court of Claims on the former trial of this case (43 C. Cls. 274). In the present record, the court has not found the value, probably because in view of its decision against the claim on the law of this item, it was not deemed necessary. It is submitted that the claimant is clearly entitled to an allowance for this amount, as for work done outside of the requirements of the contract upon the direct order of the Secretary of the Navy.

Miscellaneous Items.

In addition to the ventilation system, the claimant was required to and did put in a very large amount of additional work over and above the requirements of the specifications, the several items of which are set forth in Findings V to XIV, inclusive (record, pp. 17–21). They are summarized in our statement of the case (*ante*, p. 5). If the value of the ventilation system be taken at the amount stated in the claimant's protest against being required to do it (p. 15), and as it was found by the Court of Claims on the first trial of this case, *ante*, p. 5), that is, $1,500, the total amount of extra work required on this contract would be $4,325.80, or a total of about 17 per cent of the contract price of $25,940 (contract, paragraph 8, subparagraph 1, p. 6),—an amount quite sufficient to wipe out the profit which a contractor might reasonably hope to make from his contract (stated in *Venable Construction Company* v. *United States*, 114 Fed. Rep. 763, 771, to be 15 per cent and *Monroe* v. *United States*, 35 C. Cls. 199, 207 (affirmed 184 U. S. 524) to be from 10 to 25 per cent).

Of course, if this contract puts it into the hands of either the architect appointed to superintend the work or the Secretary of the Navy to order any additional amount of extra work, and then deprive the contractor of all compensation by their simple assertion that it is covered by the requirements of the contract, there can be no recovery for it. We contend, however, that there is no such rule of law, and that the requirements having been made by proper authority and the work having been done in accordance therewith, the Government is bound to pay for the same.

The McLaughlin contract which was by reference (paragraphs 1 and 2, p. 4) made a part of this contract

by its third paragraph (record, p. 9), provided that any changes which might either increase or diminish the cost of the work "must be agreed upon in writing by the parties of the first part by the architect appointed by the Secretary of the Navy to superintend the work." It is true that it is added that the agreement must be approved by the Secretary, and also that the drawings, plans or specifications shall not be changed when the cost of the change exceeds $500 except upon the written order of the Secretary of the Navy. The vast majority of these changes involved less than $500 and as to them we contend that the architect was clearly the agent of the Government to bind the United States by his orders.

Several of the items require special notice. As regards item 7, laying 4-inch drain pipe (record, pp. 18–20), the preceding contractors, McLaughlin & Co., "were requested by the Bureau of Equipment of the Navy Department to submit an estimate of labor and material for laying 655 ft. of 4-inch vitrified drain pipe. They offered to furnish such drain pipe at the rate of 48 cents a foot, making $314.40, and their offer was accepted by the Department. This order was afterwards officially countermanded."

The claimant was, after the date of his contract, requested to submit an estimate, and he did so, proposing to do the work at the same price as had been named by McLaughlin & Co.

"The claimant protested in writing to the Secretary of the Navy against being required to do this work, as a part of his contract, but was, nevertheless, required to do it, and did it."

His letter of protest is contained in the Findings (pp. 19, 20). It states that in the inventory of the Board of Appraisers who appraised the value of the work done

under the forfeited contract with McLaughlin this pipe is marked "extra order countermanded."

It seems almost too plain for argument that this work was ordered in such a way as to make it binding upon the Government to pay for it as an extra.

In *Merchants' Exchange Company* v. *United States*, 15 C. Cls. 270, 275, the Court of Claims said, in a case arising under a contract of somewhat similar form:

"It was the duty of the superintendent not only to make an estimate, but 'to fix and agree to the amount of payments to be made for additional work.' The claimant was not to do the work until an agreement had been entered into, and that required the concurrence of both parties. When the superintendent made his estimate and presented it to the claimant, that was an offer on the part of the defendants. The claimant rejected it and made a different proposition for compensation, to wit, the actual cost of the work to be determined by the bills of expense. To this it does not appear that the superintendent made any objection, and it seems that the work was done upon that understanding. In our opinion, the defendants became liable to pay the actual cost of the work, and that they can not discharge their liability by paying the amount of the underestimate made by their superintendent, to which the claimant did not agree, but which it expressly rejected."

The claimant appealed to the Secretary of the Navy, setting forth these two successive estimates for the extra work by his predecessor in the contract and by himself (Record, pp. 19, 20). But his appeal was overruled. It would seem that if it were ever possible to order additional work upon a contract in such a way as to bind the Government, it would be as to this item (Finding V, pp. 17, 18).

Finding V (pp. 17, 18) shows a requirement to do an item of work amounting to $1,389.40 in putting asphalt down over concrete, stated, it is true, in the specifications,

but not carried into the drawings, which "showed only one layer of finish." "The putting down of this asphalt on top of the concrete is of no advantage and is unusual in construction. Owing to the addition of the asphalt finish over the concrete, these cellar rooms when completed were and to-day are two inches less in height than as shown on the drawings" (p. 18).

Thus, the claimant was made to expend $1,389.40 in doing work which is in absolute discrepancy with the drawings, decreasing the height of the room contrary to the drawings, and of no advantage to the Government. Specifications, like all legal instruments, are entitled to a sensible construction in accordance with the usages of the business with reference to which they are made. A contractor can not justly be required to do work which can be of no advantage to any one.

In the recent case of *Atlantic Terra Cotta Co.* v. *Masons' Supply Co.* 180 Fed. Rep. 332, it was said (p. 338):

"It is further contended, and with considerable show of reason, that the true meaning of the words of the contract of July 26, 1906, which required plaintiff to furnish the terra cotta 'shown on the drawings and described in specifications,' is that it should furnish such terra cotta and such only as was both shown on the drawings and described in the specifications. This of course is construing the phrase as it is written, and the word 'and' conjunctively. It is true that 'and' is frequently read as 'or'; but this does not seem necessary in order to effectuate the apparent intent of the parties in the present instance. *Rice* v. *United States* (Eighth Circuit) 53 Fed. 910, 911, 912, 4 C. C. A. 104; *Fredenburg* v. *Turner*, 37 Mich. 402, 405; *Mayer* v. *Cook*, 26 Misc. Rep. 774, 57 N. Y. Supp. 94, 95."

Authorities.

A few more authorities bearing on the questions raised by this appeal will be cited.

In *Wood* v. *Fort Wayne*, 119 U. S. 212, the contract provided (p. 316):

"'And it is hereby agreed that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer and trustees, and a stipulated price for same agreed upon, whenever such stipulation may be practicable. When otherwise, such claims to be made to the trustees in writing within ten days after the completion of such extra work, or before the payment of the next succeeding monthly estimate after such work is done, failing to do which all rights of the contractor to such extra pay shall be forfeited. * * *

"'The said trustees shall have the right to make any alterations in the extent, dimensions, form, or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alterations diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work, such actual increase to be paid for at contract rate for work of its class.'"

The authorities ordered extra work, but not in the form provided by the contract. The court held that they were entitled to be paid for it. It was said (p. 320):

"The clause providing that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer and trustees, is an independent clause from that which provides that the trustees shall have the right to make any alterations in the plan of the work, either before or after its commencement; and the extra work referred to in the former clause does not embrace work done in pursuance of an alteration made by the trustees in the plan. The latter work may be, in one sense, extra work, but if it results from an alteration of plan by the trustees, and there is, in consequence, an increase in the quantity of work, the actual increase is to be paid for, at

the 'contract rate for work of its class.' The extra work referred to in the former clause required the authoritative written order of the engineer and trustees; but, as the trustees had the right to alter the plan, work done to carry out such alteration, when made by the trustees, was authorized by the trustees, in a manner equivalent to a written order by them and the engineer. The change of plan involved in crossing at Clinton street, was authority for the additional cost of crossing there, without a written order."

In *United States* v. *Stage Company*, 199 U. S. 414, 422, 423, this court by Mr. Justice Day, says:

"There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amout of additional work—evidently not within the contemplation of the parties—without additional compensation, would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals. The phrase 'new or additional service' is not one of exact meaning, defining the precise extent of the obligation incurred, and permits the court to give it a reasonable construction with a view to doing justice between the parties. In giving a proper construction the court is required to examine the entire contract, to consider the relation of the parties and the circumstances under which it was signed. *Rock Island Railway* v. *Rio Grande Railroad*, 143 U. S. 596, 609. It was said by Mr. Justice White, in *O'Brien* v. *Miller*, 168 U. S. 287, 297:

"'The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and inter-

preted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *Boardman* v. *Reed*, 6 Pet. 328; *Canal Co.* v. *Hill*, 15 Wall. 94.'

"And, upon the same subject, Mr. Justice Bradley, in the case of *Canal Co.* v. *Hill*, 15 Wall. 94, 99, said:

"'We should look carefully to the substance of the original agreement * * * as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements.'"

In *Wyandotte Railway* v. *King Bridge Company*, 100 Fed. Rep. 197, a case decided in the Circuit Court of Appeals by Judges Taft, Lurton, and Day, the opinion was delivered by Judge (now Mr. Justice) Day. Paragraph 4 of the syllabus, entitled "Provision against extra work" (p. 198), is as follows:

"A provision, in a contract for the building of a bridge in accordance with certain plans and specifications, that no extra labor or material shall be used or changes made in the plans, and no charge for extra work or materials shall be made, unless agreed to in writing, does not deprive the contractor of the right to recover for additional work or material furnished outside of the contract at the request of the other party, although not agreed upon in writing, or for extra labor or materials made necessary by an error on the part of the representative of such other party in locating the bridge, for which the contractor was not responsible."

The court says (p. 205):

"The railway company, it appears, took but little active part in the construction of this bridge. It was contented to allow the supervising engineer to look after and conduct the work in connection with the township boards. The structure, as we have said, was to be a single structure, in which all were interested. We think the bridge com-

pany might well rely upon directions given within the scope of his authority by the engineer, as well as like directions of the members of the township boards acting in good faith in the construction of the work,— not to change the terms of the written contract, but as directing matters essential to the construction of the bridge, not specifically covered by the terms of the written agreement."

In *Venable Construction Company* v. *United States*, 114 Fed. Rep. 763, which was a suit under the second section of the Tucker Act (24 Stat. L. 505) on a contract for construction of fortifications, the court held the Government liable for extra work ordered by the officers in charge of the fortifications, saying (p. 770):

"Capt. Carter first, and afterwards Capt. Gillette, were the officers in charge of the construction of these fortifications. They were not such subordinate officers as would classify extra work ordered by them as mere voluntary work, on account of the subordinate or inferior character of their duties; but, having the control that has been indicated, they could make such alterations in the character of material, and direct it to be used in such way, it seems to me, as would make their actions binding on the government. Certainly this is true as to the two items in respect to which their action is held to have brought about an implied contract by the government to pay in this case."

In *Caldwell & Drake* v. *Schmulbach*, 175 Fed. Rep. 429, the Circuit Court for the Northern District of West Virginia, said under a contract similar in terms to this (p. 437):

"If, therefore, extra work was performed by the contractors here, under express oral contract upon the part of the owner personally or by and through his agents, the architects, or under such circumstances implying a consent to be liable therefor, such extra work should be

allowed for, but for reasons stated the evidence should be clear, and the burden is upon the contractor to produce it."

The English case of *Walton-on-the-Naze Urban Dist. Council* and *Moran*, 2 Hudson's Building Contracts (third edition, 1907), 400, is in point. The syllabus shows the point decided:

"A contract was made for the construction of works, including 'cast iron outlet pipe to low water,' 'as described in the specification and conditions and set forth on the drawings.' The contractors also agreed to deliver a copy of the priced bill of quantities on which the tender was based. The general plan of the works showed the outlet pipe extending to low-water mark, but the section showed it as extending 279 feet further into the sea. The length of pipe in the bill of quantities corresponded with the length of pipe shown in the section, but there was no price fixed in the bill of quantities for underwater works. The contractor executed the work according to the section extending to about 279 feet beyond low-water mark, and claimed to be paid for the work beyond low-water mark at fair and reasonable prices for such work. Held, that the work done beyond low-water mark was not covered by any price in the contract, and that the contractor was entitled to be paid the price he claimed, the liability and not the amount being disputed."

In *Grant* v. *United States*, 5 C. Cls. 71, 85, the court says:

"Here the extra work has been done and materials furnished under the supposed authority of the chosen agents of the government, when the contractors were ready and willing to complete the building in strict accordance with their original agreement. The building is made more valuable, permanent, and useful, by the extra work and materials bestowed upon it, than it would have been had it been completed according to the terms and specifications of the written contract; and we think,

upon the plainest principles of natural justice and common equity, the United States are bound to pay the fair and reasonable value of the extra work and materials.

"We are aware that this is a delicate doctrine when applied to the United States, which only act through their agents, whose authority is limited by law; but under the broad provisions of the act of February 24, 1855, organizing this court, we have jurisdiction over all 'claims founded on contracts, *either express or implied*,' and a stronger case of implied contract can scarcely be presented.

"To hold otherwise, under the circumstances of this case, would be to hold that the United States, through their accredited agents intrusted with the supervision of the execution of their contracts, could at their own option put it out of the power of the contractors to fulfill their agreements with the government, by compelling them to depart from the original stipulations in the written agreements, and to perform other and additional labor, which they were not bound under contract to perform, and then escape payment by pleading nonperformance. Such a doctrine is abhorrent, and opposed to all the well-settled principles of justice and equity, and can not be recognized by any court of justice."

In *Dialogue* v. *United States*, 22 C. Cls. 196, 204, the court says:

"Hartt became and was from the time of his detail the responsible and authoritative agent of the United States, and as such ordered and directed the claimant not only in the performance of the agreement as to the work specially provided by the contract, but also in the addition of such extra work as they might agree from time to time to attach to the original undertaking. It was a contemporaneous construction of the parties, which determine and fixed the liability beyond the power of repudiation upon the part of either."

In this case the action of the Secretary of the Navy in affirming the requirement that the contractor should

construct the ventilation system, shows that the whole management of the work was left to the architect. An appeal to the Secretary of the Navy from every one of many small items involved in this case would have been futile when two appeals had resulted unsatisfactorily. It was practically a case where the situation existed that is described in some of the decisions we have quoted where the whole management of the construction was left to the architect. The orders for extra work were given by competent and proper authority, the work to be performed was outside of the contract, and it is only just that the Government should pay for it.

Conclusion.

Finding XV (pp. 21, 22) shows that a former member of the firm of McLaughlin & Co. participated in the management of the work under this contract and in the profits thereof. It also shows that the arrangement was not only known to the government architect, but received his sanction and cooperation. It is in all respects such an arrangement as this court held to be valid and proper in *Hobbs* v. *McLean*, 117 U. S. 567.

The judgment should be reversed and the cause remanded to the Court of Claims with instructions to give judgment in favor of the claimant for the value of the extra work described in Findings III, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV (pp. 12–21).

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Appellant in No. 255,
Appellee in No. 256.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SAMUEL M. PLUMLEY, APPELLANT, v. THE UNITED STATES.	No. 255.
THE UNITED STATES, APPELLANT, v. SAMUEL M. PLUMLEY.	No. 256.

APPEAL AND CROSS APPEAL FROM COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is a sequel to that of P. H. McLaughlin & Co., reported in the 36th Ct. Cls., p. 138, and the 37th Ct. Cls., p. 150, and grew out of the construction of the new Naval Observatory on Georgetown Heights.

P. H. McLaughlin & Co. were the original contractors for the construction of the Naval Observatory buildings. The McLaughlin contract was declared forfeited by the Secretary of the Navy on September 8, 1891 (R., 11), and the work of completing said

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buildings was by contract let to Samuel M. Plumley, on the 16th day of February, 1892, with provision that all work covered by the McLaughlin contract and "*duly authorized changes*" should be completed "on or before the 1st day of June, 1892." (R., 1–5.)

The consideration stated in the McLaughlin contract was $307,811, and the "*authorized changes*" increased the cost of the work $7,891.13 and decreased it $2,537.78, leaving to be paid the contractors for extra work caused by the authorized changes the additional sum of $4,439.57. (R., 11.)

In addition to the cost of the extra work, as above stated, McLaughlin & Co. were paid the sum of $5,485.70 for excavating and concrete work, and to other contractors for work done in connection with the construction of the Naval Observatory buildings there was paid the sum of $32,888, which included the sum of $8,580 paid to Warner and Swasey for the shutters of the prime vertical and the three transit rooms in which was installed the ventilation system. (R., 11.)

The circular inviting proposals for the completion of the Naval Observatory buildings had attached to it a copy of the McLaughlin specifications, and stated that:

> In view of the advanced condition of the work of completion of the new Naval Observatory, and in order to furnish, as fully as practicable, such information as to the present condition of the work as may be necessary for persons desiring to submit bids therefor, numerous manuscript notes and erasures have

been made in these detailed specifications. Such alterations do not, however, constitute the "duly authorized changes in the plans and specifications" that are referred to in the proposals for the completion of the new Naval Observatory, and the advertisement inviting the same, dated January 7, 1892, but are made solely for the assistance of bidders in making their estimates. They do not impair the requirements of the specifications as set forth in this circular and as amended prior to September 8, 1891. (R., 11.)

The firm of P. H. McLaughlin & Co., the original contractors, was composed of three parties, Patrick H. McLaughlin, John G. Craig, and Augustus Davis, jr. The last named was also a partner of the claimant, Samuel M. Plumley, to the extent of owning a one-half interest in the profits to be realized on the Plumley contract. (R., 21, finding XV.)

The McLaughlin contract was by the Secretary of the Navy on September 8, 1891, declared forfeited for failure of the contractors to proceed with the work. (R., 11.)

The Plumley contract called for the completion of the Naval Observatory buildings on or before the 1st day of June, 1892, but this contract period was extended by the Secretary of the Navy to February 8, 1893. (R., 4–5, 11.)

The Plumley case was tried twice in the Court of Claims and each time judgment was rendered in favor of Plumley for $502.50, as stated in the conclusion of law on page 23 of the record, and is based upon the facts stated in finding II. (R., 12.)

As to all other items, the petition was dismissed on the authority of McLaughlin's case (37 Ct. Cls., 150).

On the 4th day of April, 1910, Plumley made application for an appeal, which was allowed (R., 27), and on April 7th the defendant made application for an appeal, which was also allowed.

ARGUMENT.

THE CLAIMANT'S APPEAL.

VENTILATION SYSTEM—4-INCH DRAIN PIPE.

Finding III sets forth all the facts relative to the installation of what is known as the ventilation system. (R., 12–17.) Some time after the work had been commenced by McLaughlin & Co. under the original contract, the architect employed by the Government to superintend the construction of the buildings submitted a change in the plans and specifications providing for a system of ventilation. These changes were set out on a paper called "Memorandum No. 1 of Proposed Changes in Plans of New Naval Observatory." The fifth paragraph of said memorandum stated that:

> Plans showing these changes are in the hands of the Superintendent of the Naval Observatory. They have been examined by the contractors (McLaughlin & Co.), who offer to make all changes according to plans and specifications prepared by me, at a total cost of nine hundred ($900) dollars. (R., 13, paragraph 4.)

Among the plans mentioned in the fifth paragraph of memorandum No. 1 (R., 13) as showing the changes

and as having been examined by the contractors, McLaughlin & Co., was plan No. 79, which shows the ventilation work in the transit buildings. The date of memorandum No. 1 is May 2, 1889. Plan No. 79 was received by the contractors February 18, 1889, and *was examined by Mr. Plumley before bidding* on the work of completing the Naval Observatory buildings.

The offer of McLaughlin & Co., mentioned in the fifth paragraph of memorandum No. 1, was made in writing, approved by a board of officers, the Bureau of Navigation, and the Secretary of the Navy, in accordance with the third section of the McLaughlin contract, which is set out in finding I (R., 9–10), and the work covered by said memorandum No. 1 was performed by the two contractors McLaughlin & Co. and Plumley, and paid for by the Government. (R., 13.)

The drawings and specifications accompanying the original McLaughlin contract did not show any provision for ventilation, but the system of ventilation installed in the Naval Observatory buildings was set out on the drawings and plans accompanying memorandum No. 1, which *were shown to the claimant Plumley when estimating before bidding.* (R., 13 and 14.)

The drawings showing the ventilation system were handed to McLaughlin & Co. with instructions by the architect *to proceed with the work, and they did so* and had installed a part of the system of ventilation without objection prior to the forfeiture of their

contract, all of which was fully known to the claimants (Samuel M. Plumley and his partner Augustus Davis, jr.) at the time the Plumley bid for the completion of the McLaughlin contract work was made and accepted. (R., 14, subfinding 3.)

Appellant Plumley was required by the contract to *complete* the system of ventilation. He protested that such work was not a part of the "*authorized changes*" referred to in paragraph 2 of his contract. The architect ruled that the ventilation work was a part of that shown in memorandum No. 1 and the accompanying drawings which McLaughlin & Co. had agreed to do for $900, and that it therefore constituted a part of the unfinished work covered by the McLaughlin & Co. contract and the "authorized changes." (R., 14.)

Plumley, under the ninth clause of his contract, appealed from the decision of the architect to the Secretary of the Navy. The Secretary of the Navy sustained the architect, and thereby decided that the work of installing the ventilation system constituted a part of the duly authorized changes shown in said memorandum No. 1 and drawings thereto attached. (R., 15.)

The McLaughlin contract and specifications were referred to and made a part of the Plumley contract. (R., 4, sec. 2.)

The third section of the McLaughlin contract required that changes *increasing or diminishing* the cost of the work must be agreed upon in writing

before taking effect, and to be approved by the Secretary of the Navy, and further—

> *Provided*, That the drawings, plans, or specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars ($500), except upon the written order of the Secretary of the Navy, and that if changes involving an expenditure in excess of said sum thus made, the actual cost thereof and the damage caused thereby shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the parties of the first part shall be bound by the determination of said board or of a majority thereof as to the amount of increased or diminished compensation which they shall be entitled to receive, if any, in consequence of such change or changes. (R., 9–10.)

The ninth section of the Plumley contract provided that—

> If any discrepancy appear between the drawings, plans, specifications, proposals, letter, or contract of October 2, 1888 (McLaughlin contract), aforesaid, and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds himself, his heirs, and assigns, and his personal and legal representatives, to abide by his decision in the premises. (R., 6.)

Plumley, as stated, under this section of his contract appealed from the decision of the architect to the Secretary of the Navy, who decided that the installation of the ventilation system was a part of the duly authorized changes covered by memorandum No. 1 and drawings made a part thereof. (R., 15, 19.)

On page 9 and repeated on pages 11 and 16 of brief filed herein by counsel for appellant Plumley statement is made that the work covered by memorandum No. 1 was performed by McLaughlin & Co. and paid for, reference being made to finding III, subfinding 1. (R., 13.) The said finding does not state that McLaughlin & Co. performed the work covered by memorandum No. 1. That this is true is evidenced by the fact that the Court of Claims in its opinion (R., 25, bottom of page) states that in its previous findings the court was of the opinion that memorandum No. 1 *did not include the ventilation system and was not an authorized change under the terms of the McLaughlin contract*, but after going over the records in both the McLaughlin and Plumley cases and after making a most careful comparison and examination of the plans and specifications, especially plan No. 79 construed in conjunction with the summary of changes, the court modified its findings and opinion and in this way "confirms defendants' contention that the ventilation system was included in memorandum No. 1. The court's first impression was that memorandum No. 1 was limited to the changes made in the distances between the clock

room and the east-and-west transit circle room, overlooking the summary of changes wherein these identical changes are expressly provided for." (R., 25–26.) The first impression of the court seems now to be the contention of the counsel for claimant; otherwise it would not be contended that all of the extra work covered by memorandum No. 1 was performed by McLaughlin & Co. and paid for before the forfeiture of that contract. To make this contention counsel for appellant must overlook and disregard the facts stated in finding III, last paragraph of subfinding 2 and the first paragraph of subfinding 3. The last paragraph of subfinding 2 states that—

> *said ventilation work was fully set out on the drawings and plans which were shown to the claimant when estimating before bidding as stated in subfinding 1.* (R., 13, last paragraph subfinding 1.)

The first paragraph of subfinding 3 (R. 14) is as follows:

> The drawings showing the system of ventilation were handed to McLaughlin & Co. with instructions by the architect to proceed in accordance therewith, and *they had proceeded a short distance* in the construction in accordance with said drawings at the time their contract was forfeited, all of which was fully known to claimants at the time their bid for completion of the McLaughlin contract was accepted. (Italics ours.)

It will be noted that the Court of Claims uses the word "*claimants*," while the present claimant is Samuel M. Plumley. By the word "*claimants*" the court evidently had reference to Samuel M. Plumley and Augustus Davis, jr., his partner. *Davis was also a member of the firm of McLaughlin & Co.*, and of course knew to what extent the ventilation system had been installed at the time of the forfeiture of the McLaughlin contract. In addition to this, the record fails to show that McLaughlin & Co. at any time raised the question that the installation of the ventilation system was not one of the authorized changes covered by memorandum No. 1. In this way Plumley (with his partner, Davis) had notice that McLaughlin & Co. had partly installed the ventilation system, and therefore Plumley must have known that the ventilation system was a part of the authorized changes covered by memorandum No. 1.

Knowing, as Plumley did, that the ventilation system was partly installed at the time of the forfeiture of the McLaughlin contract, he was thereby *warned* that he would be required to complete the installation of the ventilation system when he contracted to complete the Naval Observatory buildings in accordance with the McLaughlin contract and the duly authorized changes. (See case of *Hughes* v. *United States*, No. 74, October term, 1911, decided Jan. 9, 1912, pp. 3–4 of the opinion in pamphlet. See p. 16, post).

On page 13 of the brief filed herein by counsel for appellant, Plumley, statement is made that the bidders for completing the Naval Observatory buildings

"were bound to base their proposals upon the drawings, plans, and specifications annexed to the McLaughlin contract." This statement would be correct if to it were added the words "*and duly authorized changes in the plans and specifications*," as stated in the claimant's proposal for the completion of the new Naval Observatory buildings, the first and second sections of the Plumley contract (R., 4), and referred to in the circular inviting proposals for the completion of said buildings which is set out in the next to the last paragraph on page 11 of the record.

LAYING 4-INCH DRAIN PIPE.

Plumley laid 655 feet of 4-inch vitrified drain pipe. This work was performed under the direction of the officer in charge and *in accordance with his construction of the contract plans and specifications*. Plumley, however, protested in writing to the Secretary of the Navy against being required to do this work as a part of his contract. (R., 19, 22.)

Section 3 of the original McLaughlin contract required that changes before taking effect—

> must be agreed upon in writing by the parties of the first part and by the architect appointed by the Secretary of the Navy to superintend the work—the agreement to set forth fully the reason for such change or changes, to state clearly the quantities and prices of both material and labor thus substituted for those named in the plans and specifications, and, before taking effect, to be approved by the said Secretary. (R., 9.)

Plumley was required to do this work by the officer in charge, as above stated, in accordance with his construction of the contract plans and specifications. The protest made by him to the Secretary of the Navy is set out in the second section of a letter addressed by him to the Secretary under date of April 19, 1892. (Finding 7; R., 19.)

The ninth section of the Plumley contract (R., 6), hereinbefore set out, made the decision of the Secretary of the Navy final as to any discrepancy appearing between the drawings, plans, and specifications, and Mr. Plumley in that section of his contract bound himself to abide by said decision.

It is a well established principle of law, and this court has frequently so held, that it is competent for the parties to a contract similar to this to make provision that the decision of an engineer or other officer in all or specified matters of dispute which may arise during the performance of the contract work shall be final and conclusive, and that in the absence of fraud or mistake so gross as to necessarily imply bad faith such decision will not be subject to the revisory power of the courts. *Kilberg* v. *United States*, 97 U. S., 398; *Martinsburg & Potomac Railroad* v. *March*, 114 U. S., 549; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S., 185; *United States* v. *Gosnell & Gleason*, 175 U. S., 602.

This doctrine was again considered by your honorable court as late as January 9, 1912, in the case of the *United States* v. *McMullen & Stulz* (No. 100,

October term, 1911), wherein Mr. Justice Holmes, speaking for the court, on this question, said:

> We deem what we have said sufficient to justify our conclusions without considering the argument of the solicitor general that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract rather than as representing the United States. See *United States* v. *Gleason*, 175 U. S., 588. Of course if the Secretary be so regarded the contractor's right is made out, as the extension would be independent of the will of the other party to the contract—the United States.

The Secretary of the Navy in this case, as in the McMullen case, must be considered as a third party, and Plumley, by the ninth section of his contract, bound himself to abide by the decision of the Secretary of the Navy on such questions, and the Secretary of the Navy deciding, as he did, against the appellant, the Court of Claims rightly held that he was not entitled to recover for this work.

WORK DONE BY CLAIMANT UNDER VERBAL PROTEST.

Findings IV, VI, VIII, IX, and XII set out work done by Plumley, but under verbal protest to the officer in charge. Finding VII, hereinbefore referred to under the heading "Laying 4-inch drain pipe," refers to work done by Plumley, though protesting in writing to the Secretary of the Navy.

Findings V, X, XI, XIII, and XIV have reference to work done by appellant without protest under the direction of the officer in charge and in accordance with said officer's construction of the contract plans and specifications. (R., 22.)

The work or alleged extra work set out in findings IV, V, VI, VIII, IX, X, XI, XII, XIII, and XIV *was never referred to the Secretary of the Navy*, as required by the ninth section of the Plumley contract. It would therefore seem that appellant Plumley at the time acquiesced in the ruling of the officer in charge when he required the work covered by said findings to be done by him. Otherwise he would have appealed to the Secretary of the Navy, under the said ninth section of his contract, as he did on the question of installing the ventilation system.

It will be noted that the alleged extra work covered by these findings set out work necessary to complete the buildings. For instance, it is stated in the 14th finding that "No saddles are specified in the specifications or shown in the plans." These saddles were for the doors in the main building. A saddle is a piece of material at the bottom of a door and over which the door stands when closed. The value of these saddles as fixed by the Court of Claims is $1.50. The question of saddles for the doors in the main building is one of the very minor details of construction, and section 2 of the McLaughlin contract was no doubt drawn for the purpose of providing for just such an emergency as the omission

from the drawings and specifications of such a small detail as these saddles. Said section in part provides:

> No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the parties of the first part, and all claims for extra compensation by reason of, or for or on account of, such extra performance are hereby, and in consideration of the premises, expressly waived. (R., 9.)

What has been said about the saddles for the doors in the main building could very well be said about all of the alleged extra work covered by findings IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV. All of the work covered by these findings was only matters of the minutest detail when compared with the magnitude of the work covered by the McLaughlin and Plumley contracts, which called for an expenditure of approximately $350,000.

CONCRETE AND ASPHALT IN CELLARS.

Finding V (R. 17) refers to the concrete and asphalt placed in cellars. The McLaughlin specifications provided under the head of concrete floors that the cellars were to be concreted throughout without exception, and then followed a sentence as follows: "Trowel off smooth and mark with marking tool, and finish equal to granolithic pavement." This last sentence was erased in the copy of the speci-

fications annexed to the Plumley contract, *thereby giving specific notice to the claimant Plumley that a coat of asphalt*, required by the specifications as set out in this fifth finding, was to be placed *upon this bed of concrete*. It was for that purpose that said sentence was erased by the drawing of a line through it in order that there would be no marking of lines in the concrete to show through the asphalt.

In the case of *Hughes* v. *United States*, supra, decided January 9, 1912, Mr. Justice Lurton, speaking for your honorable court, in part said:

> Knowing of the manner in which the mails carried by the three railroads in question were handled, acquired after the contract was signed, is not, of course, fatal to his contention that the contract did not include that mail matter. It does, however, appear that after his proposal had been accepted and before the beginning of performance he actually took a temporary contract, for the carriage of the identical mails, so that when he entered upon his own regular contract he was fully aware of the conditions. This must, at least, weaken the force of his going forward under protest. But aside from this information, *the advertisement and instructions warned him to* familiarize himself with the situation by personal investigation and inquiry. This he asserted he had done, for in his printed proposal he stated that, "This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service and also after careful examination of the condi-

> tions attached to said advertisement and with intent to be governed thereby." (Italics ours.)

The McLaughlin specifications were part of the Plumley contract. They provided for the *placing of concrete with a cover of asphalt* in the cellars, and the claimant Plumley bound himself to place *both concrete and asphalt* in the cellars, as required by the specifications, when he signed the contract. In addition to this, the erasing of the sentence "Trowel off smooth and mark with marking tool and finish equal to granolithic pavement" *warned him that over this concrete the specification specially required a cover of asphalt*, as set out in said Finding V.

NONE OF THE ALLEGED EXTRA WORK WAS AGREED TO IN WRITING, AS THE CONTRACT REQUIRED.

The second paragraph of Finding XVI (R., 22) is as follows:

> Neither is it shown that any of the alleged extra work charged for in claimant's petition and set out in the findings of fact was contracted for in writing in accordance with the terms of section 3 of the original contract with McLaughlin & Co., which by the first clause of the Plumley contract was made a part of the contract involved in this case.

Section 3 of the McLaughlin contract, referred to above by the Court of Claims and hereinbefore partly set out, is as follows:

> Third. If at any time during the prosecution of the work it shall be found advantageous or necessary to make any change or

changes in the requirements of the drawings, plans, or specifications which may either increase or diminish the cost of the work, such change or changes must be agreed upon in writing by the parties of the first part and by the architect appointed by the Secretary of the Navy to superintend the work, the agreement to set forth fully the reason for such change or changes, to state clearly the quantities and prices of both material and labor thus substituted for those named in the plans and specifications, and, before taking effect, to be approved by the said Secretary: *Provided*, That the drawings, plans, or specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars ($500) except upon the written order of the Secretary of the Navy, and that, if changes involving an expenditure in excess of said sum thus made, the actual cost thereof and the damage caused thereby shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the parties of the first part shall be bound by the determination of said board or of a majority thereof as to the amount of increased or diminished compensation which they shall be entitled to receive, if any, in consequence of such change or changes. (R., 9.)

This same question was before the Court of Claims in the case of *McLaughlin* v. *United States* (37 Ct. Cls., pp. 150, 197), and Mr. Justice Howry, delivering the opinion of the court, on this question said:

The claims for extra work and material rest upon what plaintiffs term the arbitrary disregard of their rights in the orders given by the architect's assistant. It is asked that these items be enforced upon an implied contract for a quantum meruit, and they are discussed by both sides upon their merits, irrespective of the apparent disregard of the terms of the contract excluding extras unless duly authorized.

The architects were without authority to order changes which increased the cost to the defendants where the expenditures were less than $500, unless an agreement setting forth fully the reasons and stating the quantities and prices was first approved by the Secretary of the Navy. The plans could not be changed when the cost exceeded $500, except upon the written order of the Secretary; and changes involving expenditures in excess of said sum, with the actual cost, had to be first determined by a board on changes. If extra work was done on the order of a subordinate having no authority to give the order, which increased the cost to plaintiffs, it is their misfortune. No contract can be implied, even though defendants may have reaped a material benefit, without proof of an order from the proper authority showing a waiver of the express provisions of the agreement. Extra work done on the order of the local assistant architect who supervised the work was prohibited. The contract could neither be enlarged nor changed by a subordinate, and even in the case of an assurance that additional compen-

sation would be allowed, such an agreement is inoperative and void. (*Hawkins* v. *United States*, 96 U. S., 689; *Ferris* v. *United States*, 28 Ct. Cls. R., 332; *Driscoll's case*, 34 Ct. Cls. R., 524.)

Section 3744 of the Revised Statutes provides that:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof.

This section was before the Circuit Court for the Northern District of New York for consideration in the case of *Churchyard* v. *United States* (100 Fed. Rep., p. 920), wherein it was held:

> Under Rev. Stat., secs. 3714, 3744, as amended by 20 Stat., 36, and Army Regulations, par. 825, providing that all contracts for extras in the construction of Government buildings shall be in writing and made under the direction of the chief officer of the War Department, and that no expenditure of over $500 shall be made without the approval of the Secretary of War, no recovery can be had by a contractor for extra work, for items which were never the subject of any agreement, nor authorized by the officer in charge as extras, nor submitted by him to the War Department.

This same section 3744 of the Revised Statutes was considered by your Honorable Court in the case of

United States v. *McMullen & Stulz*, No. 100, present term, decided January 9, 1912, and Mr. Justice Holmes, speaking for the court, in part said:

> It is urged that the last-mentioned section dealing with changes deemed desirable by the Government requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the Government to make a change, *but requires a writing as a condition of going on*. See Revised Statute sec. 3744. The same notion is repeated in the specifications with even more definite assumption that the Government may make changes if it sees fit. "Should it be to the interest of the Government to make any changes in the plans * * * the * * * compensation is to be determined," etc. (Italics ours.)

Not only does section 3744 of the Revised Statutes, which the courts have held to be mandatory, operate as a statute of frauds and prevents Appellant Plumley from recovering compensation for said alleged extra work, but the provision of the McLaughlin contract, section 3, which is also a part of the Plumley contract, prevents him from recovering unless the requirement of that section is complied with, to the effect that all changes either diminishing or increasing the cost of the contract be *agreed to in writing*. The findings show that this section of the McLaughlin-

Plumley contract was not complied with as to any of the alleged extras set out in the claimant's petition or the court's findings of fact.

THE DEFENDANT'S APPEAL.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the Government for $502.50 on the facts stated in Finding II, being premiums paid for insurance by claimant during the extended period of his contract.

Section 3 of the Plumley contract (R., 4–5) and section 10 of the McLaughlin contract (R., 10–11) cover the question of delay.

Section 10 of the McLaughlin contract is as follows:

> The delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the work within the period herein specified therefor shall entitle the parties of the first part to a corresponding extension of the period within which the work is to be completed.

The said Finding II states that—

> The contract time for the completion of the work was extended by the Secretary of the Navy to February 8, 1893, giving as a reason therefor that failure to complete the work within contract time was on account of circumstances beyond claimant's control. (R., 12.)

The second finding also states that the appellant Plumley was delayed in completing the buildings by the defendants in not having the architect on hand promptly for decisions pertaining to the same. (R., 12.) That part of said section 10 on the question of delays caused by the Government is as follows:

> *Provided*, however, that no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the parties of the first part shall at the time of the occurrence of such delay notify him in writing of the facts and circumstances in each case and of the extent to which they claim that the final completion of the work is thereby delayed. (R. 11.)

Said finding II further states:

> Neither is it shown that the claimant at the time of the occurrence of such delay notified the Secretary of the Navy in writing of the facts and circumstances thereof and the extent to which the final completion of the work would be thereby delayed. (R. 12.)

Appellant Plumley bound himself to notify the Government, as above stated, when the delay is chargeable to the United States. Not only does said provision of the said section 10 of the contract require him to give notice that the Government is chargeable with the delay, but he shall in writing at the time of the occurrence of such delay state all the facts and circumstances in each case and of the

extent to which he claims the final completion of the work will be thereby delayed. This he did not do.

The first part of section 10, to which Plumley *agreed*, provides that if the Secretary of the Navy shall find that delay is properly attributable to the Navy Department, the *claimant is entitled to a corresponding extension of the contract period* within which the work is to be completed. *No other provision is found in either the McLaughlin or Plumley contract providing for any damages by reason of delay chargeable to the Government.*

In the case of the *Merchants' Loan and Trust Company* v. *The United States* (40 C. Cls., p. 117) it was held that—

> Where extra time to the contractor is made the equivalent for delay caused by the defendants, and the claimant has not shown that such extra time was refused, there can be no recovery.

Mr. Justice Wright delivered the opinion of the Court of Claims in the above case and in doing so, in part, said:

> The question arising for decision on findings IV to IX, inclusive, is whether claimant can recover, under the clause of the contract quoted in the first finding, for the alleged damages for the delays caused by the defendants, as found and recited in the findings of the court.
>
> The legal effect of the part of the contract referred to is that the entire work covered by the contract was to be completed within eight

months from the date of the approval of the bond, and that any particular portion of the work should be completed within such reasonable time as might thereafter be definitely specified in written notice to the contractor, and should there be a failure to so complete the work in the time required the contractor should forfeit $200 per day as liquidated damages thereafter until the completion of the same, provided that if *through any fault of the defendants* the contractor should be delayed in the execution of the work included in the contract he should be allowed one day additional to the time stated for such completion for each and every day of such delay so caused by the defendants, and that no claim should be made or allowed for damages which might arise out of any delay caused by the defendants.

The provisions of the contract just recited are as valid and binding as any other part of it, and having been voluntarily entered into the contractor has agreed that no claim shall be made or allowed arising out of the delay caused by the defendants mentioned in the findings. Extra time to the contractor was made the equivalent for delay caused by the defendants; and the claimant has not shown that such extra time was refused by the defendants.

In respect to the right to recover damages for delays the contract is purely unilateral and is confined to such damages as might be caused by the contractor alone, and for the delays caused by the defendants there can be no recovery. [Italics ours.]

(40 Ct. Cls., pp. 117, 131–132.)

The findings in the Merchants' Loan and Trust Company case, above mentioned, show that that company during the period covered by the extension of the contract expended $240 for glass insurance and $480 for fire insurance, making a total of $720 for insurance claimed as damages in said case. (40 Ct. Cls., pp. 117, 122, 123, near top of two last-named pages.)

The Plumley contract contained provisions covering the question of damages as the result of delay, as did the contract in the Merchants' Loan and Trust Company case. Plumley by the 10th section of the McLaughlin contract, which is a part of the Plumley contract, obligated himself to accept a corresponding extension of time for any delay caused by the defendant (R., 10-11) and in doing so the contract period was extended as a result of the delay caused by the defendant. Section 5 of the Plumley contract provided for the insurance of the Naval Observatory buildings and appurtenances during the contract period. Said section is as follows:

> The buildings and appurtenances embraced by this contract and all materials and appliances provided for and used in the completion thereof, shall be kept duly insured, which insurance shall be renewed and increased from time to time, by and at the expense of the party of the first part. (R., 5.)

Both section 10 of the McLaughlin contract and section 3 of the Plumley contract provided that Plumley, at the time of any delay caused by the Government, should give notice "in writing of the facts

and circumstances in each case and of the extent to which they claim that the final completion of the work is thereby delayed." No such notice was ever given. No claim for damages or increased cost of construction was made at the time of the occurrence of any delay caused by the Government and which entitled claimant to a corresponding extension of the contract period.

The last sentence of the first paragraph of finding II (R., 12) states that "It is not shown that claimant suffered any loss by reason of said delay except the expenditure of $502.50, premiums paid upon insurance claimant was obligated to carry upon the work." *This insurance it is contended he was obligated to carry during the contract period which covers the term of extension by the fifth section of his contract.* (R., 5.)

The extension of the contract period by the Secretary of the Navy made no other change in the terms and provisions of the contract, and section 5, which obligated the claimant Plumley to keep the buildings and appurtenances insured at his expense, was still in force and effect and was so until the end of the contract period as extended.

On page 8 of the brief filed herein by counsel for Plumley several cases are cited as authority for the allowance of the cost of insurance as one item of damage resulting from delay caused by the Government. The latest case is that of *Cramp & Sons* v. *The United States* (216 U. S., 494). The findings of fact in this case are reported in 43 Ct. Cls., p. 202, and the item of insurance is set out near the middle

of page 214. An examination of the findings fails to disclose any provision in the Cramp contract providing that "The delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the work within the period herein specified therefor shall entitle the parties of the first part to a corresponding extension of the period within which the work is to be completed," as does the 10th section of the McLaughlin-Plumley contract in the present case. (R., 10.)

The provision of the Plumley contract obligating him to accept an extension of the contract period as a result of delay caused by the Government is as binding as any other provision of his contract. The courts have frequently held that it was proper for the parties to a contract to fix definitely and specifically the damages in the event of a breach or delay chargeable to either party. (*Bethlehem Steel Company* v. *United States*, 205 U. S., 105.) In the present case extra time to the contractor was made the equivalent of delay caused by the defendant, and no other damage or relief was given him by his contract. Where a contract provides for fixed and settled damages in the event of a breach or delay, the terms of the contract on this question should control and the courts should not give relief to the contractor for damages other than those set out in the contract. To do so nullifies the damage provisions of contracts.

The findings state that Plumley suffered no other loss and he made no claim for any increased cost of construction, insurance, or damage as a result of this delay at the time of its occurrence, and in not doing so he waived any right he might have had to compensation for increased cost of insurance or construction as a result of the delay caused by the defendant.

In the case of *United States* v. *Gleason* (175 U. S., pp. 588, 609) no forfeitures were declared at the time of the several extensions of the Gleason contract, and your honorable court held that failing to declare forfeitures at the time of the several extensions they must be considered as waived. Mr. Justice Shiras, in closing the opinion of the court in the Gleason case, on this question, said:

> As no actual damage or loss was definitely shown to have been suffered by the Government by reason of the noncompletion of the work, and as no forfeitures were declared at the time of the several extensions, and may therefore be deemed to have been waived, we affirm that portion of the judgment of the court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted.

If the Government by failing to declare forfeitures at the time of the several extensions in the Gleason case, waived them, Plumley likewise waived his right for any additional or extra compensation as a result of the extension of his contract by not making it known in writing to the Secretary of the Navy at the time of the occurrence of such delay.

It is therefore respectfully submitted that the action of the Court of Claims in rendering judgment against the Government for $502.50 on the facts stated in the second finding should be reversed and its decision otherwise affirmed, with instructions to dismiss claimant's petition.

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WILLIAM W. SCOTT,
Assistant Attorney

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PLUMLEY v. UNITED STATES.

UNITED STATES v. PLUMLEY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 35, 36. Argued December 9, 1912.—Decided January 6, 1913.

Where a contract for Government work provides that in case of discrepancies between the specifications and the contract, the matter shall be referred to the Secretary of the Department making the contract, and the contractor agrees to abide by his decision in the premises, the construction given by the Secretary and his decision is final and conclusive.

Where a contract for Government work provides that in every instance changes must be made by a prescribed method and approved by the Secretary, the contractor cannot recover for extras not ordered in the manner prescribed; and this rule holds even in a hard case where, as in this instance, the work was extra and of value.

Where the contractor fails to notify the Secretary of the cause of delay on the part of the Government in the manner prescribed by the contract and thus enable the Secretary to remove the cause of delay, the contractor cannot recover for the delay caused.

43 Ct. Cl. 266, reversed in part.

THE facts, which involve the construction of a contract for government work, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant in No. 35, and appellee in No. 36.

Mr. William W. Scott, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

In October, 1888, P. H. McLaughlin & Company contracted to build the Naval Observatory in Washington

for $307,811. After most of the work had been done the contract was forfeited for failure to make satisfactory progress. 37 Ct. Cl. 150. The Government advertised for bids to complete the work. After examining the contract and documents Plumley agreed to complete the building in accordance with the McLaughlin contract, and "duly authorized changes" by June 1st, 1892, for the sum of $25,840. Having finished the work, he sued the Government for damages by delay and for extra work amounting to $12,813. The court rendered judgment in his favor for $502 insurance paid during the period he was delayed in finishing the work. All of the other items were disallowed. Both parties appealed. 43 Ct. Cl. 266 and see 45 Ct. Cl. 185.

1. The largest item is a claim for extra compensation for installing a ventilator system, which McLaughlin agreed to do for a given sum. The proposed change and this offer were submitted by the architect to the Bureau of Equipment with the statement that if approved McLaughlin would enter into a formal written contract to do the work for the prices named. The plans and bid were approved. McLaughlin was directed to proceed, and did some work thereon. Later his contract was forfeited. Plumley (and his partner, Davis, a former member of McLaughlin & Company) knew these facts at the time the bid was made to complete the work, but when required to build the ventilating system Plumley insisted that it was not within McLaughlin's original contract and not a "duly authorized change" because no written contract had been signed by both parties, as required by the terms of the contract. This contention was rejected by the architect and, on appeal, by the Secretary of the Navy. The Court of Claims at first sustained this position but on a rehearing held that Plumley was estopped from claiming that the change had not been duly authorized and, under his contract to complete the work, was bound to finish

what McLaughlin had begun. Beyond this the contract provided that if there was any discrepancy between plans and specifications or between the contract of McLaughlin and the contract of Plumley the matter should be referred to the Secretary, Plumley agreeing "to abide by his decision in the premises." The Secretary decided against him and under the circumstances his construction is binding on the contractor.

2. This same provision prevents a recovery for the drain pipe included in the original contract. For some reason, not stated, it appears that McLaughlin was requested to make a bid for laying drain pipe. It was accepted and then countermanded. Plumley was likewise requested to make a bid, which was accepted and then countermanded. When required to lay the pipe he demanded extra compensation, but his appeal was overruled by the Secretary, possibly for the reason suggested in argument, that asking a bid did not relieve Plumley from the obligation to furnish labor and material actually included in the contract. What facts were submitted to the Secretary, is not in this record, but his ruling is conclusive, in view of Plumley's agreement to abide by his decision.

3. The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract.

Rev. Stat., § 3744; *Hawkins* v. *United States*, 96 U. S. 689; *Ripley* v. *United States*, 223 U. S. 695; *United States* v. *McMullen*, 222 U. S. 460.

4. The Government appeals from so much of the judgment as gave Plumley a judgment for damages caused by delay. The court found that Plumley was delayed by the failure to have the architect on hand promptly for decision pertaining to the work, while it also found that the Secretary extended the time for the reason that Plumley's failure to finish was on account of circumstances beyond the contractor's control. But Plumley at the time of the occurrence of the delay did not notify the Secretary of the facts nor of the extent to which the work would be delayed. The contract required that such notice should be given to the Secretary when the delay occurred, evidently for the purpose of informing the Department and enabling it, at the time, to remove the cause of the delay. It operated to prevent claims for damage and for failure to comply with this requirement of the contract (*United States* v. *Gleason*, 175 U. S. 588); the plaintiff is not entitled to recover. The judgment in that respect must be reversed, and is, otherwise,

Affirmed.